In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, APPELLANT,
v.
THE CHICAGO, MILWAUKEE & ST. PAUL Railway Company. } No. 173.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit has for its ultimate object the recovery by the Government of the minimum government price ($2.50 per acre) of about 4,300 acres of land situated in Kossuth, Palo Alto, and Dickinson counties, Iowa, which were erroneously patented to appellee under the railroad land-grant act hereinafter mentioned and which have all since been sold to *bona fide* purchasers. Chancery jurisdiction was invoked in order to obtain discovery and accounting, and to have a lien and trust in favor of the Government declared in respect of the moneys

now in appellee's possession arising from said sales. The general duty to proceed in such cases is imposed on the government officers by the act of March 3, 1887 (24 Stat., 556).

All of the lands involved in the suit are situated within the place limits of the railroad land grant hereinafter mentioned, as those limits were fixed by the definite location of the aided railroad in the years 1864 and 1869 (paragraph 5 of the bill of complaint, record 2, 3, which by paragraph 2 of the stipulation of facts, record 23, is taken to be true), and the fundamental question in this case is, whether or not those lands (*which were, at the time of the passage of that grant and at the time of the definite location of the railroad aided by said grant, claimed by the State of Iowa under the swamp-land grant of 1850*) could pass to the railway company under its grant, notwithstanding the pendency of such claims of the State of Iowa and the express regulation of the land department that lands as to which such claims were pending should be withdrawn from sale. The contention of the Government is that the pendency of such claims of itself segregated the claimed lands from the public domain, so that they were not within the granting clause of the railroad grant at all; and further, that by reason of the express regulation just referred to, the lands were reserved to the United States within the meaning of a proviso of the railroad grant excepting therefrom all lands so reserved.

The facts are as follows: By the first section of the act approved September 28, 1850 (9 Stat., 519), the

United States granted to the State of Arkansas (and by section 4 of the same act its benefits were conferred upon "each of the other States of the Union"), for the purpose of enabling said States "to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation."

The second section of the act provided:

> That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof.

On November 21, 1850, the Commissioner of the General Land Office (who, of course, was acting in behalf of the Secretary of the Interior) issued a circular of instructions to the various Federal surveyors-general for the purpose of initiating the work of listing the granted swamp lands as required by said act. One paragraph of this circular is quoted in the stipulation of facts (record, 31), as follows:

> The only reliable data in your possession from which these lists can be made out are the field notes of the Surveyor on file in your office, and if the authorities of the State

> are willing to adopt these as the basis of these lists you will so regard them. If not, *and these authorities furnish you satisfactory evidence that any lands are of character embraced in the grant, you will report them.*

From this quotation it will be seen that the Government, immediately after the passage of the swamp-land act, required the various States to elect either to accept as conclusive evidence of the swampy character of lands within their borders the field notes of prior government surveys (which were not made for the purpose of determining the character of the lands, and which also were largely made during dry seasons when swamp or flood conditions were not apparent) or to themselves undertake the task of identifying the swamp and overflowed lands within their respective borders and proving the correctness of such identifications to the surveyors-general. Only four States—Michigan, Wisconsin, Alabama, and California—accepted the first alternative; the other States all undertook themselves to identify the lands. (1 Lester's Land Laws, 542.) The scheme thus adopted by the Interior Department for listing the swamp lands, viz, the requirement of identification, or, as it was generally called, selection, by the States, and the subsequent approval of the selections submitted by the States, has been consistently adhered to from the time it was first put in operation down to the present time. It received the express sanction of Congress, first, by an act approved March 3, 1857 (11 Stat., 251), which confirmed all selections of

swamp and overflowed lands theretofore made by the various States, and afterward by the act approved March 12, 1860 (12 Stat., 3), whereby it was enacted that selections to be thereafter made by the various States entitled to the benefit of the swamp-land grant should be made within certain specified periods of time.

In 1853 the State of Iowa passed an act entitled "An act to dispose of the swamp and overflowed lands within this State and to pay the expenses of selecting and surveying the same" (Laws of Iowa, 1853, chapter 13—numbered chapter 12, two chapters bearing that number in the printed copy of the laws), by section 3 of which it was provided that—

> In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the governor, the county court shall, at the next regular term thereof after the taking effect of this act, appoint some competent person, who shall as soon as may be thereafter, after having been duly sworn for that purpose, proceed to examine said lands and make due report, and plats upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made, marked on the said plats, to the county courts, respectively, *which courts shall transmit to the proper officers lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same on the part of the United States,* which lists, after an acknowledgment

> of the same by the General Government, shall be recorded in a well-bound book provided for that purpose, and filed among the records of the county court.

Pursuant to this act the county courts of Kossuth, Palo Alto, and Dickinson counties appointed agents to identify and list the swamp lands in their counties, respectively, and it is stipulated that the records of the General Land Office show that on August 22, 1859, and March 27, 1860, respectively, the United States surveyor-general for Iowa certified and transmitted to said Land Office lists of lands in Kossuth and Palo Alto counties purporting to have been selected as swamp lands by said agents acting under the aforesaid appointments, to which lists were attached affidavits by said agents as to their authority and the correctness of the lists. Also, that said surveyor-general certified that the lists so transmitted by him were true and correct transcripts from the original lists which were filed in his office. The lists so certified by the surveyor-general were received and filed in the General Land Office on August 25, 1859, and April 3, 1860, respectively (Rec., 27).

It was also stipulated (with reference to the selections for Dickinson County, the third of the counties above named) (Rec., 27, 28):

> That the records of said General Land Office further show that on March 23, 1872, there was *on file* in said Land Office at Washington a list of lands in Dickinson County, Iowa, purporting to have been selected as swamp

lands, by one Benjamin F. Parmenter, and to said original list was attached an affidavit and certificate in the words and figures following, to wit:

STATE OF IOWA, *County of Dickinson, ss:*

I, Benjamin F. Parmenter of said county having been duly appointed, commissioned, and authorized by the county judge of said Dickinson County upon the first Monday of October, A. D. 1857, to select and make return of the swamp and overflowed lands in said county, do solemnly swear that the above returned list of selections is just and true; that I am a practical surveyor and as such have examined the lines bounding each of the tracts of land particularly designated in the foregoing list, and I do further solemnly swear that the great part of each and every 40-acre tract (or other smallest legal subdivision) therein named is of the character described in the above list and is "swamp or overflowed" land of the character "embraced in the act of Congress approved the 28th day of September, A. D. 1850," and generally known as the "Swamp Land Act."

BENJAMIN F. PARMENTER.

STATE OF IOWA, *County of Dickinson, ss:*

This is to certify that before me Leonidas Congleton, County Judge in and for said County of Dickinson, personally came Benjamin F. Parmenter on the 23d day of July, 1860, by me commissioned and authorized to select and make return of the swamp or overflowed lands in said county as embraced in the act of Congress approved the 28th day

of September A. D. 1850 and subscribed and made oath to the foregoing affidavit. In witness whereof I have hereunto set my hand and affixed the seal of said county of Dickinson at my office in said County this 23d day of July, A. D. 1860.

[SEAL.] LEONIDAS CONGLETON,
County Judge.

All the lands involved in this suit were included in the lists just referred to, with the exception of the NE. ¼ of the NW. ¼ of sec. 23, T. 94, R. 32, in Palo Alto County, Iowa, "which was never selected or claimed as swamp land at any time," and was therefore doubtless erroneously included in this suit.

It will be seen, therefore, that the selections of swamp lands in Kossuth and Palo Alto counties were undoubtedly made and on file in the General Land Office on and after April 3, 1860, and it is likewise true that the selections of swamp lands in Dickinson County were made on July 23, 1860, and, as will hereafter be shown in the argument, it must be presumed that they reached the General Land Office shortly after that date. It should be noted here, too, that this Dickinson County selection was made after the passage of the Act of 1860, above mentioned, which expressly authorized selections of swamp lands by the States, and hence superseded the prior instructions of the Land Department to the extent that such instructions made it necessary to satisfy the surveyor-general of the correctness of the selection before the selection was entitled to be filed.

Accordingly, it is clear from the foregoing facts that from and after the year 1860, and until they were ultimately passed upon (in 1876), the selections of swamp lands made by the agents of the three named counties were on file in the General Land Office awaiting adjudication; and it is expressly stipulated (par. 8 of stipulation of facts, record 29, as amended by par. 17 of the supplemental stipulation of facts, record 34–38); that during all that time the State of Iowa persevered in asserting its claim that said lands belonged to it under the swamp-land act.

Appellee contends, however, that the mere filing of a claim to swamp lands was not enough to call for any action in respect thereto by the Interior Department, but that such claim had to be "recognized" in some way by the Interior Department before it could be considered *sub judice*, with the result of segregating the claimed lands from the public domain. Although the correctness of such contention is disputed, the Government additionally asserts that in view of the duty imposed by regulations of the Interior Department upon the surveyors-general to inquire into the validity of swamp-land claims before transmitting them to the Interior Department the certification of the lists by the surveyor-general of Iowa was of itself a recognition of the *prima facie* validity of the State's claim by the Government, for said regulations expressly required the various surveyors-general before transmitting to the Interior Department any state claim to examine into its correctness, and unless he was satisfied that it was valid

to reject it. Such regulations, which were in the form of instructions to the surveyors-general, are collected in I Lester's Land Laws, pages 542–573. The first of them, issued November 21, 1850, provides, as already shown, that if, and only if, *the state authorities shall satisfy the surveyor-general that the lands claimed are of the character embraced in the grant he shall report them.* It does not authorize him to report them under any other circumstances. That this was always thoroughly understood by all concerned is conclusively shown by a letter addressed by the Commissioner of the General Land Office to the Secretary of the Interior under date of January 22, 1858, which, so far as it bears on this case, reads as follows:

> SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, in which you desire me to report whether, in my opinion, in bringing to a close the grant of September 28, 1850 (No. 182), in cases of selections reported to this office since March 3, 1857 (No. 319), and in cases where the selections yet remain to be made, the general instructions of November, 1850, are sufficient, and should be adhered to, or should new or additional regulations be adopted.
>
> After the adoption of the circular of November, 1850, many questions were presented relative to the extent of the requirements in said circular, and the duty of the surveyors-general acting in virtue thereof. And to avoid, as far as possible, any misapprehension, the surveyor-general of Arkansas, who, it seemed, had not fully comprehended the in-

structions above referred to, and those thereafter issued, explaining their true intention, was addressed in a communication from this office, dated April 8, 1854, embodying the instructions on this subject, and which were to be regarded as overruling those explanatory of the circular of November, 1850. *These instructions are applicable to all those States where the selections are made by agents appointed under state legislation*, except in the States where the office of surveyor-general does not exist. In such case, their selections are subject to the revision of this office; and, in order that you may fully understand the evidence required in the adjustment of the grant, I will here give you so much of said communication as relates to the subject.

"In all cases where the plats and field notes represent the lands as swampy, or subject to such overflow as to render them unfit for cultivation, they belong to the State, under the law, and will be so certified.

"Where lands are claimed by the State, under this act, which are not so represented on the plats and field notes, *you will require the production of satisfactory evidence, that the greater part of each forty-acre subdivision of the lands is of the character specified in the act.*

"*This point has always been maintained by this office*, and if any instructions heretofore issued have been otherwise construed, it has been an error. The field notes and plats are only 'incontrovertible' when they clearly indicate the swampy character of lands, and the reason for this distinction was explained in

the circular letter of November 21, 1850, a copy of which, accompanied by the printed instructions of that date, was transmitted to his excellency the governor of Arkansas. * * *

"The misapprehension now existing doubtless arises from the fact that this office still continues to require an examination of the lists of the State locating agents, with the field notes, etc. You will observe, however, that such examination is not regarded as final or conclusive. If said records clearly indicate the swampy character of lands, then they are incontrovertible, and your certificate of approval is based thereon; but in the event of their being silent, or even indicative of a contrary character, you have recourse, under instructions, to the *evidences furnished by the state authorities, and if that be deemed by you sufficient and satisfactory, you are instructed to certify the lands to this office.* If such testimony be *insufficient*, you are authorized *to require from the state authorities the production* of such further evidence as will enable you to give the required certificate, and if not furnished, *you will reject the selections.*

"The evidence, as already stated, must be satisfactory to you that the lands claimed by the State are of the character granted by the law. Where that evidence is not contained in the field notes you should require the testimony of competent and disinterested witnesses who should be required to testify that they understand the mode and manner of surveying and marking the public lands; that they

have examined the lines and corners of the lands in relation to which they testify and so much of the surface as to enable them to state, of their own personal knowledge, that the greater part of each 40-acre lot claimed by the State is swampy, or subject to such overflow as to render it unfit for cultivation. On such testimony, whether presented heretofore or hereafter, if satisfactory to you, you will certify the lands to the State."

* * * * *

In view, therefore, of the very clear and definite character of the explanatory instructions above, and further, that the authorities of the States affected by the grant have made no objections to the instructions, I can not perceive that any additional instructions and regulations are required. Nor does the act of 3d March, 1857, present to me any particulars requiring a departure, or any necessity for additional instructions to be issued to those already established relating to the selections made and reported to this office since the passage of that act, or to those remaining to be made. (1 Lester's Land Laws, 559–561.)

Upon the foregoing facts it is indisputable that the State of Iowa in 1860 had in fact asserted title to the lands in question; that the surveyor-general of Iowa had transmitted the State's claims to the Department of the Interior, at least so far as they related to lands in Kossuth and Palo Alto counties, and that in transmitting such claims to the Interior Department *the surveyor-general was exercising a discretionary power either to certify or reject such*

claims according as he was or was not satisfied that they were correct. Between 1860 and 1864 nothing occurred to change the situation in respect of these lands in any way; but on May 12 of the latter year Congress passed an act (13 Stat., 72) which granted to the State of Iowa—

> * * * For the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal

> to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid: *Provided*, That the lands so selected shall in no case be located more than twenty miles from the lines of said roads: *Provided, further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act*, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

Appellee, the successor of the McGregor Western Railroad Company, which was named as the beneficiary of the grant, succeeded to the rights of said McGregor Company in 1878, and completed the railroad described in the act of Congress making the grant by January 1, 1880, and thereafter all of the land in question was patented to it, in the mistaken belief on the part of the Interior Department that, upon the disallowance of the State's claims to the land under the swamp-land act (which claims were disallowed in 1876), the land passed to the railway

company under the grant of 1864, instead of reverting to the public domain.

It is alleged in the bill (Rec., 4) and admitted in the answer (Rec., 19) and stipulated as a fact (Rec., 24) that, prior to 1896, all the lands in question were conveyed by appellee to bona fide purchasers for value without notice or knowledge of any claims or rights of the United States in said land, and in such a case the act of March 3, 1887 (24 Stat., 556), as amended by the act of February 12, 1896 (29 Stat., 6), pursuant to which this suit is brought, forbids a suit to cancel the patents and limits the Government to a right of action to recover the minimum sale price of the lands.

The case was tried upon the stipulations of fact found at pages 23–38 of the record. The lower court entered a decree dismissing the bill. (Rec., 53.) Upon appeal to the Circuit Court of Appeals for the Eighth Circuit the decree of the lower court was affirmed. (Rec., 70, 71.) The opinion of the lower court will be found at pages 39–53 and the opinion of the Court of Appeals at pages 62–71 of the record.

By paragraph 24 of the answer (Rec., 20) it was asserted that the Government's action was barred by the limitation provision of section 1 of the act of March 2, 1896. (29 Stat., 42.) This point seems not to have been relied on in the Court of Appeals, for it was not referred to either in the opinion of that court or in the brief of appellee therein, but it may be urged here and accordingly it will be argued.

ASSIGNMENT OF ERRORS.

Fifteen errors are assigned in the record, but they may, for convenience, be consolidated into the following:

1. The court erred in holding that at the time the railroad grant took effect the claims of the various counties of the State of Iowa to the lands involved in this suit were not pending before the Secretary of the Interior, with the result of segregating such lands from the public domain.

2. The court erred in holding that at the time said land-grant act of 1864 was passed said lands were not reserved to the United States for the purposes of internal improvement within the meaning of the proviso of the first section of said act.

3. The court erred in holding that the title of the United States to the lands in controversy was good and complete at the time of the grant of 1864, and that the lands passed under the terms of the granting clause of said act.

ARGUMENT.

I. The claims of the State of Iowa to the lands involved in this suit were *sub judice* in the Department of the Interior from 1860 to 1876, during which period the railroad grant and the definite location of the railroad thereunder were made.

II. The existence of the State's claims to the lands at the time the railroad grant took effect prevented any of such claimed lands from passing under said grant.

III. The subsequent disallowance of the State's claims in 1876 could not inure to the benefit of the railway company. Its rights under the land-grant act must be determined as of the date that act took effect.

IV. There are no equities in this case in favor of appellee.

V. This action is not barred by limitation.

As to these—

I.

The claims of the State of Iowa to the lands involved in this suit were sub judice in the Department of the Interior from 1860 to 1876, during which period the railroad grant and the definite location of the railroad thereunder were made.

1. That the State had a right to present claims to swamp lands to the Interior Department and to have those claims adjudicated is indisputable.

(*a*) Although the swamp-land act did not in terms provide for the presentation and decision of claims by the States, it nevertheless clearly contemplated them. This is obvious from the fact that the act provided for conveyance of the lands only upon request of the governor. It is inconceivable that the governor would have been required to make demand for conveyance after the Secretary of the Interior had completed and submitted a list of the swamp lands, unless it was intended to authorize the governor to verify such list and make claim to any lands which he might believe to have been erroneously

omitted; and, since the right of the State to make claim to lands under the act was thus recognized, it can not be material whether those claims were made before or after the Secretary of the Interior had prepared his list of them. This is especially clear because the swamp-land act vested in the State an immediate inchoate right to all the swamp lands within its borders. Although its title did not become complete until the Secretary of the Interior had identified and patented the land, it still had an inchoate title. (*Rogers Locomotive Works* v. *American Emigrant Company*, 164 U. S., 559, 570.) Indeed, this court has repeatedly recognized the rights of the States to assert their title to these swamp lands, notwithstanding the failure of the Secretary of the Interior to act. (*Wright* v. *Roseberry*, 121 U. S., 488, 500–510, and cases there cited.)

(*b*) But whether or not the swamp-land act itself authorized the States to present claims to swamp lands, it is clear that such claims were not only authorized, but were required by the action of the Interior Department in compelling the States either to accept as conclusive evidence of the character of the lands the field notes of previous government surveys (which were admittedly inaccurate in this respect), or to themselves assume the burden of identifying the lands and of furnishing to the department evidence in support of such identification. The circular instructions issued to the Federal surveyors-general on November 21, 1850, explicitly directed such surveyors-general to confer with the

state authorities and explain the adopted plan. Practically all the States (Wisconsin, Michigan, California, and Florida being the only exceptions) chose the second alternative. (1 Lester's Land Laws, 542.) Indeed, it was forced upon them under penalty of loss of much of the land to which they were rightfully entitled under the act. It results, therefore, that in presenting their claims and the evidence in support of them the States were merely carrying out the directions of the Secretary of the Interior.

But it may be argued that the Secretary of the Interior had no right to prescribe the stated method of identifying the lands. To this argument there are two answers: (1) The Secretary was given plenary authority and unlimited discretion as to the manner in which identification should be made. Had he chosen to do so he could (with the consent of the States, of course) have made the state surveyors, or the various county surveyors, his agents to do the preliminary work necessary to the identification of the lands. Indeed, that is what he did do in effect. Possessing such power, he surely had the lesser power to authorize the States to present their claims to him for adjudication; (2) but whether or not the Secretary of the Interior exceeded his authority when he authorized the States to present their claims, his action was ratified by Congress on at least two occasions. By an act approved March 3, 1857 (11 Stat., 251), it was provided:

> That the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September twenty-eighth, eighteen hundred and fifty, * * * heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be, and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law.

And by the act of March 12, 1860, extending the provisions of the swamp-land grant to the newly admitted States of Minnesota and Oregon (12 Stat., 3), it was further provided:

> That the selection to be made from lands already surveyed *in each of the States* including Minnesota and Oregon, *under the authority of the act aforesaid*, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, eighteen hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed.

This act not only recognized and ratified the practice of making selections or identifications, but recognized as well that such practice was authorized by the original swamp-land act. It refers to selections made "under the authority of the act aforesaid," i. e., the original swamp-land act. Further than that, it in terms sanctioned and, indeed, required the continuance of the same practice. If, therefore, the validity of the action of the Secretary of the Interior in authorizing and requiring selections of swamp lands by the States was ever open to question, it was no longer so after the passage of the stated acts. Indeed, this court has already so held. In *Wright* v. *Roseberry*, *supra* (121 U. S., 488, 510–511), it was said:

> The act of Congress of March 12, 1860 (12 Stat., 3, c. 5), extending the provisions of the swamp-land act to Minnesota and Oregon, recognizes in its second section their right and that of other States to make selections of the swamp lands, or rather to provide for their identification, without waiting for the action of the Secretary of the Interior. That section provides that the selection to be made from lands already surveyed in each of the States should be made within two years from the adjournment of the legislature of the State at its next session after the date of the act, and, as to all lands thereafter to be surveyed, within two years from such adjournment at the next session, after notice by the Secretary of the Interior to the governor of the State

that the surveys have been completed and confirmed.

It should be noted in passing that the railroad grant in question here was not made until 1864, four years after the ratification of the system of state selections.

2. Since the State had the right to make claim for those lands which it believed to be swampy within the meaning of the grant of 1850, the presentation of its claims to the proper officer necessarily called for an adjudication by such officer or his superior, and, consequently, such claims became *sub judice* immediately upon such presentation. By presentation is here meant, of course, not merely an assertion that the lands belonged to the State, but a specific demand for designated lands, formally presented to and knowingly received by the proper government officer for the purpose of adjudication. The case is exactly analogous to that of a suit in court, which, of course, is *sub judice* from the moment the initial pleading is filed. The Court of Appeals, however, held that before these claims could become *sub judice* "recognition" of them in some way by the government authorities was necessary. In this it is submitted that the Court of Appeals was wrong.

At the outset it should be observed that the court does not define the term "recognition" as used by it, but it would seem that the court must have meant by that word something more than conscious acceptance and filing of the claim; for on the record there is no room to doubt that the State's claims were in

fact accepted and filed, not only by the surveyor-general of Iowa, the officer designated by the circular instructions of 1850 for that purpose, but by the General Land Office as well. If, however, such was the theory of the Court of Appeals, it is refuted not only by consequences which would result from its application, but by the decisions of this court as well; for if the government officers may, by refusing to "recognize" it, defeat a claim to lands which the acts of Congress grant to persons or corporations provided certain conditions exist or are complied with, then it lies in the power of the executive department to defeat such acts of Congress *merely by inaction*. It can make no difference in principle whether the claims are valid or invalid. If recognition be necessary at all, it must be necessary in every case. This court, however, has decided in at least three cases that valid preemption or homestead claims can not be defeated even by the refusal of the land officers to permit them to be filed. (*Ard* v. *Brandon*, 156 U. S., 537; *Weeks* v. *Bridgman*, 159 U. S., 541; *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S., 108.)

Further, it is submitted that the cases cited by the Court of Appeals, instead of supporting its view directly refute it. Those cases are: *Kansas Pacific Railway Co.* v. *Dunmeyer* (113 U. S., 629); *Whitney* v. *Taylor* (158 U. S., 85); *H. & D. R. R. Co.* v. *Whitney* (132 U. S., 357); *Bardon* v. *Northern Pacific Railroad Co.* (145 U. S., 535).

In the *Dunmeyer* case one Miller made a homestead entry on the land some fifteen days prior to the

filing of the map of definite location and entered upon the land within the time prescribed by law, erected a house, and lived on it for some time, but afterwards abandoned his homestead claim, which was then canceled by the Government. The only "recognition," therefore, in this case was the passive action of the local land office in permitting entry to be made.

In *Whitney* v. *Taylor* one Jones filed his preemption declaratory statement in the local land office prior to the filing of the map of definite location of the railroad. He never perfected his preemption, but, on the contrary, abandoned it, and it was finally canceled. Here, again, the only "recognition" was the acceptance and filing of the declaratory statement.

In *H. & D. R. R. Co.* v. *Whitney* one Turner, who was then a soldier in the army of the United States, and claimed to be entitled so to do under section 2293 of the Revised Statutes, "made an affidavit and caused the same to be filed in the local land office of the district wherein" the land in controversy was situated for the purpose of homesteading said land. This affidavit was insufficient to show that Turner was entitled to enter the land described in the affidavit as a homestead, because it did not state that Turner's family, or any member thereof, was residing on the land, or that there was any improvement thereon, but, upon being paid their fees, the register and receiver of the local land office allowed the entry, which stood uncanceled at the time the map of definite location was filed. Here, again, the only

"recognition" was the passive act of allowing the entry to be filed.

In *Bardon* v. *Northern Pacific Railroad Co.* it appeared that one Robinson settled upon the land in controversy and filed his declaration of settlement under the preemption laws in the local land office and paid the proper filing fees. The entry was later canceled because of lack of proof of the required residence on the land and because of the failure to pay "the money required under the preemption laws of the United States to acquire title to the land." Here, again, the only "recognition" was the acceptance and filing of the claim.

These cases therefore unmistakably show that this court has never looked beyond the fact that the claims involved had been actually presented and filed. The test has always been whether or not the *claimant* had done enough to call for action by the proper authorities. No one would contend, of course, that a mere statement to a local land officer that a claim would be presented or that the maker of the statement desired to preempt or homestead it would be sufficient, any more than it would be claimed that a statement to a clerk of a court of a desire to institute a suit would in fact amount to the commencement of a suit. But the filing of a preemption or homestead claim is the recognized method of initiating such a claim, just as the filing of a præcipe, or declaration, or complaint, or bill, is the recognized method of instituting a suit; and in either case when the filing has occurred the

claim or suit is launched and must pursue its course to adjudication unless voluntarily withdrawn. The situation in respect of the swamp-land claims was exactly analogous.

3. But if "recognition" of the State's claims to these lands was necessary there is conclusive evidence of it in the record.

(*a*) As to the lands in Kossuth and Palo Alto counties:

It appears from the stipulation of facts (Rec., 27) that the records of the General Land Office show that on August 22, 1859, and March 27, 1860, respectively, the surveyor-general for Iowa certified and transmitted to said Land Office lists of lands in said counties purporting to have been selected as swamp lands by named agents acting under appointments of the county courts of said counties for that purpose; that said lists were verified by said agents; that in each case "said surveyor-general certified that the list so transmitted by him was a true and correct transcript from such original list of swamp-land selections made by the county surveyor or state locating agents and filed in his office;" and that said transcripts or lists were received and filed in the General Land Office on August 25, 1859, and April 3, 1860, respectively.

In the Court of Appeals it was argued, though not very seriously, that the claims of the State were not properly presented, and hence (presumably) were not to be considered as claims by the State at all. It was said that the agents appointed by the

county courts to make selections of swamp lands in the two named counties—

> made "selections" of lands *claimed* to be swamp, and filed lists thereof with the surveyor-general at Dubuque. He forwarded them to Washington without approval or recommendation. These alleged "selections" were claims of agents. They did not comply with the Iowa law of 1853, which required county agents to report their selections to the secretary of state, and made it *his duty* to forward them to the Government at Washington. This was provided in order to allow the State, as the beneficiary of the grant, to reject or approve the work of its subordinate agencies, and to make claim, and present proofs through the proper channels and as the act of the State itself. (Appellee's brief, in Court of Appeals, p. 16.)

A sufficient answer to this argument is that it misstates the facts. There is not a word in the record to show that the state selecting agents filed the swamp-land lists with the surveyor-general. All that appears is that the lists were *made* by the selecting agents and were afterwards filed with the surveyor-general. *By whom they were filed does not appear.* Further than that, it is admitted by paragraph 8 of the stipulation of facts that the *State* claimed said lands continuously until its claim was rejected in 1876 (Rec., 29, 37–38). Nor is it true, as assumed in the foregoing quotation, that the Secretary of State was the only officer authorized to file the state lists with the

surveyor-general. By the Iowa act of January 13, 1853, quoted in the Statement, it was provided that the county courts, under whose appointment the selecting agents acted, should "transmit to the proper officers lists of all said swamp lands in each of the counties *in order to procure the proper recognition of the same on the part of the United States*, which lists, *after an acknowledgment of the same by the General Government*, shall be recorded in a well-bound book provided for that purpose and filed among the records of the county court." There can be no doubt that this action authorized the county court to transmit the lists to either the surveyor-general or the land commissioner, or anyone else who might be the proper person to receive them. Otherwise the act would not have contemplated the acknowledgment of receipt by "the General Government." The statute referred to in appellee's brief below was doubtless the supplemental act approved January 24, 1853 (Laws of Iowa, 1853, c. 65), which was passed primarily to provide a method for transmitting selections made by *county surveyors*, and which, therefore, were not dealt with in section 3 of the earlier act. It provided:

> That so soon as the examination and survey of the swamp and overflowed lands in any of the counties of this State shall be completed *by the county surveyor* (or other person appointed for that purpose), a full and complete return of the same shall be forwarded to the secretary of state, whose duty it shall be to report the same to the surveyor-general.

Doubtless the provision was made applicable to lists made by others than the county surveyors merely for the sake of uniformity and perhaps also to further insure the transmission of the list to the surveyor-general. Certainly it can not be contended that this provision repeals section 3 of the earlier act, especially since the later act was by its title stated to be supplemental to the earlier one. Even if this be not so, however, and if the later act repealed the earlier provision authorizing the county courts to themselves transmit the lists directly to the proper Federal officers, still in the absence of any evidence whatever to the contrary and in view of the fact that the lists were actually filed with the surveyor-general, it must be presumed that they were filed by the person whose duty it was to do so. Certainly it can not be *presumed* that they were filed by some other person; and in view of the stipulation that the State claimed the lands under the selections, nothing less than a showing, either by a conclusive presumption or by affirmative proof that the claims were in fact improperly presented, is sufficient to raise a question as to the regularity of such presentation.

We come, then, to the consideration of the effect of the assertion of the State's claims and the action taken in reference thereto by the surveyor-general. This aspect of the case presents no difficulty. On November 21, 1850, the Commissioner of the General Land Office issued a circular of instructions to the surveyors-general respecting the identification of

swamp lands, to which reference has already been made. As was mentioned in the statement, only part of that circular was quoted in the stipulation of facts on which the case was tried; but all of it may be considered by this court, because it constitutes a part of the records of the Land Department, which this court may judicially notice for the purpose of determining the legal effect of the action of the surveyor-general. (*Knight* v. *Land Association*, 142 U. S., 161, 169; *Caha* v. *United States*, 152 U. S., 211, 221.) It will be recalled that this circular stated:

> The only reliable data in your possession from which these lists can be made out are the field notes of the Surveyor on file in your office, and if the authorities of the State are willing to adopt these as the basis of these lists you will so regard them. If not, and these authorities *furnish you satisfactory evidence that any lands are of the character embraced in the grant, you will report them.*

This is the part of said circular quoted in the stipution of facts and we have already seen from the letter of January 22, 1858, that this provision directing the surveyor-general to take evidence as to the character of the land before reporting selections to the General Land Office had always been construed as requiring him not only to weigh such evidence but also to *reject the claim without forwarding it to the Land Department*, unless he was satisfied that it was valid. No language could have been more explicit than that of the letter of 1858 on this subject.

It stated that if, upon comparison of said selections with the field notes in the surveyor-general's office, it was found that lands had been selected which were not shown by the field notes to be swamp lands, then the surveyor-general should have recourse—

> to the evidences furnished by the state authorities, and *if that be deemed by you sufficient and satisfactory you are instructed to certify the lands to this office.* If such testimony be *insufficient* you are authorized to require from the state authorities the production of such further evidence *as will enable you to give the required certificate,* and if not furnished, *you will reject the selections.*

By the original instructions, therefore, it was made the duty of the surveyor-general to require "satisfactory evidence" that the lands were of the designated character *before making or transmitting to the Land Department any list of them.* By the later instructions his duty in the premises was made still clearer. He was first to compare the selections with the field notes, and if the field notes did not show the lands to be swamp lands, then he was to take affirmative action, namely, to call upon the state authorities to furnish evidence *which would enable him to give the required certificate,* and if that evidence was not furnished he was explicitly required "*to reject the selections.*"

The record is silent in respect to what took place before the surveyor-general. All that appears is that the surveyor-general did not reject the lists, but on

the contrary certified them to the Land Department. This he was positively prohibited from doing until it had been made to appear to his satisfaction that the lands were in fact of the character embraced in the swamp-land grant. His action, therefore, in certifying the lists to the Land Department was not merely a "recognition" of the claim, but was an actual adjudication by him that the lands were in fact swamp lands; and this adjudication he was not only authorized, but was in terms required to make. More complete "recognition" could not be imagined.

It was suggested in the court below that so far as the record in this case shows, the certificate of the surveyor-general did not state that in *his opinion* the lands are swamp lands and that therefore, in transmitting the lists, the surveyor-general was not exercising any discretion, but merely acting as a sort of forwarding agent. Aside from the fact that this argument completely ignores the express prohibition against forwarding the lists before the surveyor-general had himself passed upon their accuracy, and therefore of necessity presumes that the surveyor-general violated his instructions, there are three answers to it, viz: (1) There is no evidence in the record as to the precise form of certificate required of the surveyor-general or in fact made by him; (2) it does appear, however, that the certificate made by him recited that the list transmitted "was a true and correct transcript from such original list

of swamp selections made *by the county surveyor or* state locating agents and filed in his office," and since each of the lists of which he transmitted copies were made by state locating agents it is obvious from the language just quoted that the form of certificate used by the surveyor-general was a stereotyped one intended for use in the case of selections made either by county surveyors or by locating agents, and it is therefore fair to presume that this stereotyped certificate was the one which had been prescribed or approved by the Land Department; (3) the lists were received and filed in the Land Department. They had been forwarded to that department for approval. If, therefore, the certificate had not been sufficient in form in the opinion of the Land Department, that department undoubtedly would have returned the lists for proper certification.

It is clear, therefore, that the Land Department itself "recognized" the claims of the State when it received and placed on file these lists transmitted by the surveyor-general.

It was claimed, however, in the Court of Appeals that the selections were not "recognized," because there is no evidence that the surveyor-general ever took any action in respect of these lands after the receipt of a letter addressed to him on *June 23, 1860,* by the Land Commissioner in response to an inquiry by the surveyor-general of Iowa as to his duty in reporting swamp selections and setting forth the principles to be applied by him to any selections then on his files or thereafter presented to him. It is

plain that this letter was written for the guidance of the surveyor-general (who was probably newly appointed) in passing upon selections then pending before or which might thereafter be presented to him; and did not require him to reopen cases previously passed upon. The conclusive answer to this argument is, therefore, that the letter in question was *not written until after the surveyor-general had passed upon the selections of the lands* in Kossuth and Palo Alto counties and had transmitted the lists of them to the Land Office for approval. Moreover, since the claims of the State were already *sub judice* when this letter of June 23, 1860, was written, the failure of the surveyor-general to thereafter gather additional information (if the letter had required him to do so) could in no way have affected the status of the State's claim. Further than that, it is clear that in respect of lists which had already been transmitted by him and which had been received and filed in the Land Office, the surveyor-general in conducting further investigations concerning the listed lands would not be exercising his official power of determining the *prima facie* validity of the State's claim, but would be the mere agent of the Land Office to procure for it such information as it deemed necessary to proper action upon the claims. As a matter of fact, therefore, if this letter of June 23, 1860, has any bearing on this case at all, then instead of showing that the state selections had not been "recognized" by the Land Office shows conclusively that they had been; *for it requires the surveyor-general*

to take affirmative action concerning them for the sole purpose of enabling the Secretary of the Interior to render his final decision.

(*b*) As to the lands in Dickinson County:

With respect to these lands, the only evidence is that "on March 23, 1872, there was on file in said Land Office at Washington a list of lands in Dickinson County, Iowa, purporting to have been selected as swamp lands" by state agents appointed for that purpose, which was accompanied by an affidavit made July 23, 1860, stating that the lands were swamp and overflowed lands of the character described in the swamp-land act. It further appears that said lands were "posted on tract book May 28, 1872," but that "no prior record entry of any kind in regard to such selections or lists appears in said Land Office" (Rec., 27–28).

As to this evidence, it is to be observed that the list was *on file* in 1872—not that it *was filed* on the given date, and the Court of Appeals was therefore mistaken in saying that the list "did not find its way to the General Land Office until 1872" (opinion of Court of Appeals, Rec., 65); and since it does not appear *when* the list was filed, but does appear that it was made and presented to and verified before the county court on July 23, 1860, and that it was the duty of the county court, under the provisions of the Iowa act of 1853, quoted in the statement, to forthwith forward the list to the proper officers in order to procure "recognition" of the selection, it must be presumed that the list was so immediately forwarded,

and consequently that it reached the Land Office shortly afterwards, for there is always a presumption that a public officer obeys the law. (*P. & T. R. R. Co.* v. *Stimpson*, 14 Pet., 448, 458; 4 Wigmore on Evidence, sec. 2534.) Indeed, this court has already applied the rule to a case identical with the present one—*Martin* v. *Marks* (97 U. S., 345).

In that case the question was whether a state selection of swamp lands was on file in the Land Department in 1857, when the act confirming all selections *then on file in the Land Department* was passed. The evidence showed that the selection had been approved by the surveyor-general in 1852 and was on file in the Land Department in 1875, and it was held—

> that the jury or the court, if the latter tried the issue of fact, had a right to presume that the surveyor-general did his duty, and forwarded this list to the General Land Office some time between May, 1852, and March 3, 1857 (p. 348).

Further than that we know that the list was in fact filed, and on general principles the presumption would be that it was filed about the time it was made rather than at some date a number of years subsequent, for the list was prepared for the sole purpose of being forwarded to the Federal authorities, and it being afterwards found in their possession the case is precisely like that of a letter found in the addressee's possession a number of years after its date, in which case the presumption would not be that the letter was received by the addressee at about the time it

was so found in his possession, but on the contrary would be that it was received in due course of mail shortly after its date. So, too, a deed is presumed to have been delivered on the day of its date. (*United States* v. *Le Baron*, 19 How., 73; 4 Wigmore on Ev., sec. 2520.) It must be taken as a fact in this case, therefore, that the Dickinson County selection reached the Land Department at some time shortly after its date in 1860, and certainly long before the passage of the railroad land grant in 1864.

It may be argued, however, that as to these lands there is no evidence of "recognition" of the State's claim prior to the passage of the railroad grant in 1864, since the first entry in the Land Department records was made in 1872 when the lands were posted in the tract books. The answer is that in this instance "recognition," if necessary at all, arose from the very receipt and filing of the list in the General Land Office—first, because in the numerous cases cited in the foregoing subdivision of this argument there was no other evidence of recognition than the filing of the claims, and, second, because the list in question was not filed until after the passage of the act of Congress of March 12, 1860, expressly providing for the selection of lands by the States, and which was consequently a general "recognition" of the States' claims and a general authority to the States to file their claims and have them adjudicated without prior consent of the Secretary of the Interior. After the passage of that act the Secretary of the Interior could no more refuse to receive and decide any swamp-land claim

presented to him by the States than could a court refuse to receive and decide any suit begun before it by the filing of proper process. Even the Court of Appeals recognized this principle, for it said (referring to the cases which will be hereafter cited, under Point II, wherein the pendency of claims under Mexican grants prevented railroad land grants from operating) that because the right to lands granted by such Mexican grants was secured by treaty and the commission had been appointed by this Government to determine the validity of such claims, that such cases obviously involved claims *recognized by our Government* and actually *sub judice* (Rec., 67). Were claims filed with this commission entitled to any more respect than claims filed with the Interior Department by express statutory authority?

This consideration is equally applicable to the cases of Kossuth and Palo Alto counties, for although, certainly in the first of those cases, and probably also in the second of them, the selection was made prior to the act of March 12, 1860, still both selections had at that time been received by the General Land Office and therefore would have been entitled to consideration by force of the statute of 1860, even if they had not been previously properly passed upon by the surveyor-general.

There is accordingly no room to doubt that the State's claims to all of the lands involved in this suit were properly presented to, and had been sufficiently recognized by, the Department of the Interior, and were, therefore, *sub judice* there from the time they

were received in 1860 to the time they were rejected in 1876; but if further evidence of this were necessary it is to be found in the act of March 5, 1872 (17 Stat., 37), which explicitly required the Commissioner of the General Land Office "to receive and examine the selections of swamp-lands in Lucas, O'Brien, *Dickinson*, and such other counties in the State of Iowa as formerly presented their selections to the surveyor-general of the district including that State, and allow or disallow said selections." This act was a declaration by Congress that the claims which the State of Iowa had asserted were *then pending and entitled to proper consideration.*

4. An attempt was made by appellee to show that the selection of swamp lands in Kossuth, Palo Alto, and Dickinson counties, made by the State of Iowa, had been disallowed prior to the passage of the railroad grant in 1864, because in 1862 the Interior Department rejected certain *indemnity claims* made by said State under the act of 1855 (10 Stat., 634) with respect to certain alleged swamp lands in *other counties*, viz., Louisa and Fremont counties. Not only is this argument refuted by the express recognition of the pendency of the claims by the act of 1872, referred to in the preceding paragraph, but the idea that because the proof offered by the State in support of its claim to *indemnity* with reference to lands in Louisa and Fremont counties was insufficient to show that those claims were well founded, it would necessarily follow that its proof in support of original claims to swamp lands in other counties was likewise insufficient, is, to

say the least, novel. Even if it could be assumed that the sort of proof accompanying the State's selections was of the kind condemned in the stated decision still it could not be further presumed that an opportunity would not have been given to the State to present further proof of the necessary sort. It must be remembered, too, that the situation with reference to indemnity claims was altogether different from that in respect of selection claims. In the former the Land Department had, by permitting entry by settlers, in effect decided that the lands involved were *not* swamp lands; while in the latter the State's selections were themselves *prima facie* evidence that the lands *were* swamp lands. The Government might well require stronger proof in the one case than in the other; and the decision of 1862 refers *only to indemnity claims.*

II.

The existence of the State's claims to the lands at the time the railroad grant took effect prevented any of such claimed lands from passing under said grant.

For two reasons:

1. Only public lands passed by the railroad grant, and the pendency of the State's claim to the lands involved in this suit operated to segregate such lands from the public domain.

(*a*) Although the grant was of alternate, odd-numbered sections of "land," the word land, as used in the grant, meant *public* lands. *L. L. & G. R. R. Co.* v. *United States, supra* (92 U. S., 733); *Newhall*

v. *Sanger* (92 U. S., 761). In the first of these cases it appeared that on March 3, 1863 (12 Stat., 772), Congress passed a railroad land-grant act, whereby for the purpose of aiding in the construction of a described railroad it granted "every alternate section of *land*, designated by odd numbers, for ten sections in width on each side of said road and each of its branches." This granting clause, it will be observed, was identical with that of the grant of 1864, involved in the case at bar. The prescribed route of the aided railroad passed through the Osage Indian lands in Kansas, which were ceded to the Government shortly after the passage of the railroad grant, by virtue of a treaty made with such Indians pursuant to authority given to the President on the same day the railroad grant was passed. This treaty was made prior to the definite location of the railroad, and it was claimed that upon such definite location the odd-numbered sections of these former Indian lands situated within the place limits of the grant passed to the railroad. In fact such odd-numbered sections were certified to the railroad company by the government officers, and the suit was brought to cancel this certification and establish the Government's title to the land. It was held that grants of this sort "have always been recognized as attaching only to so much of the public domain as *was subject to sale or other disposal*" (pp. 741), and that consequently these Indian lands which were not subject to disposition by the Government at the time the grant was made were not within the

grant. In *Newhall* v. *Sanger* the court expressly approved and reaffirmed its former decision, saying with reference to it:

> The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present term in *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States, supra,* page 733. *We held that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves; and we confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States.* (92 U. S., 762, 763.)

And this doctrine has never been doubted since. Indeed, the reasons for it, given in the L. R. and G. R. R. Company case, viz, that such grants are to be construed strictly against the grantee; that it can never be supposed that Congress intended to include land previously appropriated to another purpose unless there be an express declaration to that effect; and that it was the policy of Congress throughout these land-grant acts to avoid any possibility of conflicts between the grantees and other claimants to lands within the limits of the grant, are conclusive.

(*b*) That the assertion and pendency of a claim to land segregates it from the public domain, so as to prevent it from passing by a grant of public lands. has been so often decided that the doctrine is not now open to contest.

In *Newhall* v. *Sanger*, just referred to, there was pending in this court, on appeal from a decision of the commission which had been appointed to pass upon the validity of Mexican grants which were protected by a treaty between this country and Mexico, a claim by the grantee of such Mexican grant at the time the railroad grant was made and the map of definite location was filed, and it was held that the pendency of this claim segregated the lands from the public domain so that they did not pass under the railroad grant, although the claim was finally rejected.

In *Doolan* v. *Carr* (125 U. S., 618), which was an action of ejectment, the plaintiff introduced in evidence a patent from the Government to the Central Pacific Railroad Company purporting to have been issued pursuant to the Pacific Railroad grant, together with proof of conveyance by that company to him self. The defendant thereupon offered to show that such patent was void because the tract of land in question was within the outboundaries of a Mexican grant of a specific quantity of land and that said grant had, prior to the making of the railroad grant, been sustained by the Supreme Court of the United States, and according to the original survey thereof the lands in question had been found to be within the grant, although by a subsequent survey made after the railroad grant it was found that such lands were not within the Mexican grant. The lower court refused to admit this evidence, and this court reversed that decision on the ground that even though the land was mistakenly surveyed in the first place, yet

'the fact that there existed a claim of a right under a grant by the Mexican Government which was yet undetermined, and to which therefore the phrase 'public land' could not attach," prevented lands from passing by the railroad grant.

In *United States* v. *McLaughlin* (127 U. S., 429), which was a bill to set aside a patent which had been issued to the Central Pacific Railroad Company on the ground that the patented land was within the out boundaries of a Mexican grant which was held and reserved for adjustment and satisfaction of said grant at the time the railroad grant was made, although this court showed that in *Newhall* v. *Sanger* the distinction between a "floating grant" of a specific quantity of land within designated out boundaries and a specific grant of all lands within designated boundaries was not sufficiently considered, and that consequently the court was wrong in holding that all of the land within the out boundaries was reserved from the public domain until the validity and location of the floating grant was determined, nevertheless it expressly reaffirmed the principle that to the extent of the land actually claimed the assertion and pendency of the claim operated to take the land out of the public domain and to prevent it from passing by the railroad grant. (See pp. 454 and 455.)

In *Carr* v. *Quigley* (149 U. S., 652), which was another action of ejectment wherein one party claimed under the Pacific Railroad grant and the other party defended on the ground that the lands in question did not pass because of the pendency of the claim under a

Mexican grant at the time the railroad grant was made, the decision in the *McLaughlin* case was followed; but the court again reaffirmed the principle that land embraced within a Mexican grant, while the claim of the Mexican grantee was under consideration, was not public land which would pass under a railroad grant. The court said:

> So, in the present case, there was only reserved from sale and appropriation by the Government within the exterior boundaries of the Mexican grant to José Noriega and Robert Livermore so much land as would satisfy the quantity actually granted to them, which was 2 leagues, and it was competent for the Government to grant the *remainder of the land*.

In *Southern Pacific Railway Co.* v. *United States* (200 U. S., 354), which was a suit brought to cancel the patents of a railway company to lands still held by it, and to confirm the title of *bona fide* purchasers to lands which had been sold by the company, and to recover the government price of said lands so sold, it appeared that the lands in question at the time the railroad grant was made were claimed by the grantee of a Mexican grant of all the land within described boundaries. This grantee had had his grant confirmed, the surveyor-general had surveyed the land, and according to this survey the lands in controversy appeared to be within the grant. Later, however, and after the filing of the map of definite location, a new survey was ordered, and from this new survey it appeared that the lands in

controversy had never been within the Mexican grant, but this court held that nevertheless the lands included within the first survey were not within the railroad grant. It is to be observed that in this case the Mexican grant was not a "float," but included all the land within the described boundaries.

In *Northern Lumber Company* v. *O'Brien* (204 U. S., 190) it appeared that in 1864 Congress made a grant of public lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to the head of Lake Superior, and two days later the railroad company, for whose benefit the grant was made, filed a map of its *general route*. Thereupon the Interior Department withdrew all lands within the limits of the grant on each side of the line of such *general* route. After the acceptance of this map of the general route and the stated withdrawal Congress granted "public lands" to the Northern Pacific Railroad Company to aid in the construction of its railroad. In 1866 the railroad company, beneficiary of the first grant, filed its map of *definite location*, from which it appeared that the lands in dispute were outside the limits of its grant as thus located, though they would have been within the limits of the grant had the original general location been finally adopted. In 1882 the Northern Pacific Railroad Company filed its map of definite location, which showed that the particular lands in dispute were within the place limits of its grant. The question in the case was whether the lands in dispute passed to the Northern Pacific Company by the grant

of 1864, and this court held it was clear that the lands "were not public lands within the meaning of the later grant and did not come under it when or because it was subsequently ascertained that they were without the limits of the grant to the Lake Superior Railroad Company and within the place limits of the Northern Pacific grant as fixed by its map of definite location (p. 201).

2. The proviso in the act of 1864 expressly excepted from the grant all lands theretofore reserved to the United States by act of Congress or by competent authority to aid in internal improvements, or for any other purpose; and the lands involved in this suit were so reserved at the time the railroad grant was made.

(*a*) There can be no doubt that the swamp-land grant was made for purposes of internal improvements. The title of the act was "An act to enable the State of Wisconsin and other States *to reclaim* the 'swamp lands' within their limits," and the language of the grant itself was "that to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein" such swamp lands were granted. Further than that, a proviso of section 2 expressly enacted that the proceeds of said lands should be applied exclusively, as far as necessary, to the purpose of reclaiming the said lands by means of levees and drains.

(*b*) The proviso did not require that the reservation of lands should be for the use or benefit of the United

States alone. On the contrary, the reservation referred in terms to lands reserved for purposes of internal improvement, and obviously, therefore, included all lands which were at the time the grant was made held by the Government for the purpose of being ultimately conveyed to the States under the various internal improvement grants. Thus, in *Wolcott* v. *Des Moines River Co.* (5 Wall., 681) and *Williams* v. *Baker* (17 Wall., 144), this court held that lands which had been withdrawn from sale pending determination of the question whether they were within the limits of a grant to the State of Iowa, to aid in the improvement of the Des Moines River, plainly came within the reservation. So, too, in *Railroad Company* v. *Fremont County* (9 Wall., 89) it was expressly held *that lands which had, before the passage of a railroad grant containing a proviso identical in form with the one involved in the case at bar, been selected by the locating agents of Fremont County, Iowa, under the swamp-land grant, and which had been withdrawn from the market pursuant to the instructions of 1850, already referred to, were reserved lands within the meaning of such proviso and did not pass to the railroad company under its grant;* while in *Railroad Company* v. *Smith* (9 Wall., 95) it was held to be competent, in defense of an action in ejectment brought by a railroad company claiming land under a grant containing a proviso identical with the one now under consideration to show that the lands in question *were in fact swamp lands and were therefore reserved to the United States,*

pending their ultimate conveyance to the States, by operation of the swamp-land act itself.

And in *Wolsey* v. *Chapman* (101 U. S., 755) the court held that the reservation from sale and entry by the Secretary of the Treasury of lands claimed to be, but which in fact were not, within the Des Moines River grant (referred to in the *Wolcott* and *Williams* cases, above) was a reservation by a "law of Congress or proclamation of the President," which prevented the State from selecting any of such lands under section 8 of the act of 1841, granting to each State 500,000 acres of land for internal improvements. Accordingly there can be no question that lands which were in fact reserved pending the decision upon the State's claim to them under the swamp-land grant were within the proviso of the act of 1864, and consequently did not pass by that grant.

(*c*) But it may be claimed that the lands which were selected by the State of Iowa, and which are involved in this case, were not in fact reserved within the meaning of the proviso of the grant of 1864. To this there are two answers:

(1) The lands in question were undoubtedly segregated from the public domain through the pendency of the State's claims to them. These claims, it has been shown, were authorized to be made under the swamp-land act and the regulations adopted by the Interior Department pursuant to it, and were also expressly recognized as properly made by the acts of Congress of 1857 and 1860. Consequently the segre-

gation of the claimed lands from the public domain was the direct result of an act of Congress, and, since the segregation was of itself nothing more nor less than a reservation of the lands from the operation of laws relating to the public domain, it follows that such lands were reserved to the United States by the enumerated Congressional acts. It must be remembered that, as this court has consistently held from the time when cases of this sort first arose down to the present day, the fundamental purpose of the various exceptions in these railroad grants was to avoid conflicts between different claimants to the same lands, and hence the reservations are liberally construed in favor of the Government. Thus, in the case of *L. L. & G. R. R. Co.* v. *United States, supra* (92 U. S., 733), it was claimed that Indian lands were not reserved "to the United States," but the court said (p. 746):

> This proviso has, in our opinion, no doubtful meaning. Attached in substantially the same form to all railroad land-grant acts passed since 1850, it was employed to make plainer the purpose of Congress to exclude from their operation lands which, by reason of prior appropriation, were not in a condition to be granted to a State to aid it in building railroads. It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government, and saved from a possible grant,

is a proposition which will command universal assent. What ought to be done, has been done. *The proviso was not necessary to do it; but it serves to fix more definitely what is granted by what is excepted.* All lands "heretofore reserved," that is, reserved before the passage of the act, "by competent authority, for any purpose whatsoever," are excepted by the proviso. This language is broad and comprehensive. It unquestionably covers these lands. They had been reserved by treaty before the act of 1863 was passed. It is said, however, that having been reserved, not "to the United States," but to the Osages, they are, therefore, not within the terms of the proviso. This position is untenable. It would leave the proviso without effect; because all the reservations through which this road was to pass were Indian. This fact was recognized, and the right of way granted through them, subject to the approval of the President. Through his negotiations with the Indians, he secured it in season for the operations of the company. Besides, there were no other lands over which he could exercise any authority to obtain that right. And why grant it by words vesting its immediate enjoyment, unless it was contemplated that the roads would be constructed during the existence of those reservations? But the verbal criticism, that these lands were not, within the meaning of this proviso, reserved "to the United States," is unsound. The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein, and had title

thereto. In one sense, they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians.

Every tract set apart for special uses is reserved to the Government to enable it to enforce them. There is no difference in this respect, whether it be appropriated for Indian or for other purposes. There is an equal obligation resting on the Government to require that neither class of reservations be diverted from the uses to which it was assigned.

In the recent case of *Southern Pacific Railroad Company* v. *United States* (200 U. S., 354), already cited, this court quoted with approval the rule laid down in the *Dunmeyer* case (113 U. S., 629), where it was said:

> It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations.
>
> The reasonable purpose of the Government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company we do not give any lands we have already sold or to which, according to our laws, we have permitted a preemption

> or homestead right to attach. No right to such land passes by this grant.

And it was in pursuance of this policy of liberal construction that the court held, in *Wolsey* v. *Chapman, supra,* a reservation by the Secretary of the Interior was a reservation by a "law of Congress or proclamation of the President of the United States."

(2) Even if the pendency of the claims did not in and of itself create a reservation of the claimed lands within the meaning of the proviso of the act, still there was an express reservation of them by competent authority. The Circular of Instructions of November 21, 1850, stated:

> *The lands selected should be reserved from sale,* and after those selections are approved by the Secretary of the Interior, the register should enter all the lands so selected in his tract book as "granted to the State by act of 28th September, 1850, being swamp or overflowed lands," and on the plats enter on each tract "State, act of 28th September, 1850." Copies of the approved lists will be sent to the registers for this purpose. (1 Lester's Land Laws, pp. 543, 544.)

To enable the local land officers to make proper record of the fact that the selected lands had been reserved, the surveyor-general was directed to transmit a copy of each list of selected lands to the local land office at the time of sending the original list to the General Land Office. (1 Lester's Land Laws, p. 543.) These instructions were reiterated in the

letter of June 23, 1860, from the Land Commissioner to the surveyor-general for Iowa, which appears at pages 32 and 33 of the Record. It was there said:

> You will, as soon as your report is arranged and prepared for transmission to this office, send simultaneously a copy thereof to the local offices of the proper land districts, with instructions to them to enter the tracts in the usual form in their books, *and to withhold them from sale or other disposition, unless otherwise especially directed by this office.*

Here, then, is an express reservation of the lands in question. That the surveyor-general did not in fact transmit the lists of the lands to the local land officers is unimportant, because, even if he did not, the reservation was complete; for it depended not upon the action of the local land officers in making notation of the fact that specified lands were reserved but upon the action of the Land Commissioner in requiring that the claimed lands should be reserved. If this were not so, then the local land officers could, by neglecting or refusing to note the reservations upon their records, defeat the action of the Land Department in making any reservation. Nor does the fact that the lands were not in truth swamp lands in any way affect this question. In the *Wolcott* case, *supra*, although the lands reserved were not within the limits of the Des Moines River grant, as those limits were ultimately settled by the decision of this court, nevertheless it was held

that "the serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them [the lands involved] to the United States till it was ultimately disposed of" (p. 689). And this was true also in *Wolsey* v. *Chapman, supra.*

III.

The subsequent disallowance of the State's claims in 1876 could not inure to the benefit of the railway company. Its rights under the land-grant act must be determined as of the date that act took effect.

Nothing is better settled than this.

In the *Wolcott* case, *supra* (5 Wall., 681), the State's claim to the land in the Des Moines River grant was ultimately rejected; but, nevertheless, it was held that the pendency of that claim at the time the railroad grant was made prevented the land from passing to the railroad company at any time. Such, too, was the decision in *Williams* v. *Baker, supra* (17 Wall., 144).

In *Newhall* v. *Sanger, supra* (92 U. S., 761), the claim of the grantee of the Mexican grant was rejected by this court only a few days after the railroad company's map of definite location was filed, but it was held that the railway company gained nothing by such rejection.

In *L. L. & G. R. R. Co.* v. *United States, supra* (92 U. S., 733), an act of Congress was passed on the very same day that the railroad grant was passed

authorizing the President to negotiate a treaty with the Osage Indians looking to the relinquishment by them of their title to the lands involved in the suit, and they did, in fact, relinquish their title a year prior to the date on which the map of definite location was filed; but this availed the railroad company nothing.

In the *Dunmeyer* case, *supra* (113 U. S., 629), the homesteader whose claims had attached at the time of the definite location of the aided railroad abandoned his homestead claim and bought the land of the railroad company, and it was argued that thereupon the land reverted to the company; but this court held otherwise.

In *H. & D. R. R. Co.* v. *Whitney* (132 U. S., 357) it will be remembered that the affidavit for homestead entry was insufficient and the entry was ultimately canceled; but it was, nevertheless, held that the existence of the entry, though defective, and though it was afterwards canceled, prevented the land from passing to the railroad.

In *Bardon* v. *Northern Pacific Railroad Company*, *supra* (145 U. S., 535), the preemption claim which prevented the lands from passing by the railroad grant was canceled in 1865, only about a year after the grant was made, and several years before the railroad company's map of definite location was filed; but after an exhaustive consideration of the point the court adhered to the rule announced in its former

decisions and held that the rejection of the claim could not inure to the benefit of the railway company.

In *Whitney* v. *Taylor, supra* (158 U. S., 85), the preemption declaratory statement, which was held to take the lands out of the operation of the railroad grant, was canceled in a proceeding commenced by the railroad company itself; but it was nevertheless held that though the preemption claim was invalid its existence at the time the railroad grant was made prevented any interest in the land from passing to the railway.

In *Southern Pacific Railroad Company* v. *United States, supra* (200 U. S., 355), the land in controversy was not within the boundaries of the Mexican grant by virtue of which the land was taken out of the operation of the railroad grant; but, though this fact was afterwards established by an official resurvey of the land, it was nevertheless held that the railway company took no title to the land.

And finally, in *Northern Lumber Co.* v. *O'Brien, supra* (204 U. S., 190), the lands in question were merely reserved pending the fixing of the definite location of the Lake Superior and Mississippi Railroad Company's line, and were not within the limits of the grant to that company, as appeared when the line was definitely fixed; but notwithstanding this fact, and notwithstanding the further fact that the lands were within the place limits of the grant to the *Northern Pacific Company*, the court held that the latter company acquired no title to them.

IV.

There are no equities in this case in favor of appellee.

The decision of the Court of Appeals was largely influenced, if not controlled, by the supposition that the equities of this case are with appellee, because, as it said, if these lands "in contemplation of law were reserved from sale the right of selection of other lands in lieu of them was conferred by the act," which right can not now be exercised because there are no longer public lands from which to make lieu selections. As to this—

1. In supposing that the right to lieu lands extended to the case of lands which did not pass by the grant, either because through the assertion of the State's title to them they were not "public lands" which would pass by the grant, or because they were reserved to the United States within the proviso of the grant, the Court of Appeals committed an obvious error. The right to lieu lands only exists in cases where claims attached or lands were reserved *after* the passage of the granting act and before the filing of the map of definite location.

The pertinent language of the statute immediately follows the description of the land granted as "every alternate section of land designated by odd numbers for ten sections in width on each side of said roads," and is as follows:

> But, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or

> any part thereof *granted as aforesaid*, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid: *Provided*, That the lands so selected shall in no case be located more than 20 miles from the lines of said roads: *Provided further*, That any and all lands *heretofore* reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, *reserved and excepted from the operation of this act* (13 Stat., 73).

Clearly the right to lieu lands exists only where the lands preempted, homesteaded, or otherwise appropriated are parts of the land "granted as aforesaid;" that is, granted by the act. The purpose of the lieu land provision, too, is very plain. It was

known that some time would be required for the definite location of the road, and that, especially in view of the prospect of railroad facilities, the public lands in the vicinity of the proposed route of the aided railroad would be rapidly settled and thereby much of the granted land might be lost to the railroad company. It was desirable, therefore, that provision be made against this contingency. But there was no reason why the railroad company should have been given lands in place of those *which would not have passed by the act even if the map of definite location had been immediately filed*, and the language of the act shows that Congress had no such intention; for, after explicitly stating that the lieu lands were only to take the place of lands granted by the act, another proviso was added which stated that no lands *theretofore* reserved to the United States for any purpose whatever were within the operation of the grant.

It is unnecessary to elaborate the argument on this aspect of the case, however, for in *L. L. & G. R. R. Co.* v. *United States, supra* (92 U. S., 733), this court considered and decided that identical question. The land-grant act contained a provision for lieu lands exactly like the one just quoted, and the court said:

> The indemnity clause has been insisted upon. We have before said that the grant itself was *in præsenti*, and covered all the odd sections which should appear, on the location of the road, to have been within the grant *when it was made*. The right to them did not,

however, depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was marked out on the ground; but, as soon as this was done, it was easy to find them. If the company did not obtain all of them within the original limit, *by reason of the power of sale or reservation retained by the United States*, it was to be compensated by an equal amount of substituted lands. The latter could not, on any contingency, be selected within that limit; and the attempt to give this effect to the clause receives no support, either in the scheme of the act or in anything that has been urged by counsel. It would be strange, indeed, if the clause had been intended to perform the office of making a new grant within the 10-mile limit, or enlarging the one already made. Instead of this, the words employed show clearly that its only purpose is to give sections beyond that limit, for those lost within it by the action of the Government *between the date of the grant and the location of the road*. This construction gives effect to the whole statute, and makes each part consistent with the other. But, even if the clause were susceptible of a more extended meaning, it is still subject to, and limited by, *the proviso which excludes all lands reserved at the date of the grant, and not simply those found to be reserved when the line of the road shall be definitely fixed. The latter contingency had been provided for in the clause; and, if the proviso did not take effect until that time, it would*

> *be wholly unnecessary. And these lands being within the terms of the proviso, as we construe it, it follows that they are absolutely and unconditionally excepted from the grant;* and it makes no difference whether or not they subsequently became a part of the public lands of the country (pp. 748, 749).

2. Section 4 of the act of 1887, under which this suit is brought, limits the extent of the recovery in such an action as this to "an amount equal to the government price of similar lands." Section 2 of the land-grant act of 1864 provides "that the sections and parts of sections of land which by such grant shall remain to the United States within 10 miles on each side of said roads shall not be sold for less than double the minimum price of public lands when sold." The established minimum price for government lands is $1.25 per acre; so that the price of government lands within the 10-mile limits was $2.50 an acre, and accordingly that is the limit (except as the allowance of interest may be proper) of the Government's recovery in this case. Undoubtedly, however, the lands were sold by appellee railway company for many times this price. It will be recalled that appellee did not receive patents for the land until 1880, so that all of its sales were made between that date and 1896, during which period, as everybody well knows, the price of lands in Mississippi Valley, and especially west of the Mississippi River, was constantly and rapidly rising. Therefore, notwithstanding the recovery by the Government of an amount

equal to $2.50 per acre, appellee will still be the gainer to the extent of the excess above that sum received by it for the lands, and this, notwithstanding that *it was never entitled to receive either these lands themselves or any lands whatever in lieu of them. Every dollar of the proceeds of the sales of these lands which it can retain, therefore, is pure profit to which it was never of right entitled.*

3. Further than that, in 1878, when appellee succeeded to the rights of the original beneficiary of the grant, the law of this case was well settled. The cases of *Wolcott* v. *Des Moines River Company*, *Williams* v. *Baker*, *Railroad Company* v. *Fremont County*, *Railroad Company* v. *Smith*, *Newhall* v. *Sanger*, and *L. L. & G. R. R. Company* v. *United States* had all been decided. Appellee, too, was bound to take notice of the claims of the State which were of public record in the government land offices, and the decisions mentioned left no room to doubt the effect of the State's claims upon the subsequent grant. Appellee, therefore, knew very well when it sought and obtained patents for the land that its title was worthless, or at least extremely doubtful, and it is consequently not in position now to claim that wrong will be done to it through a recovery by the Government in this case, especially in view of the fact that it will in any event retain by far the larger part of the proceeds of the sales, none of which ever of right belonged to it.

Instead, therefore, of the equities of the case being with appellee, they are all against it.

V.

This action is not barred by limitation.

1. The only statute of limitations whose benefit is or can be claimed is that relating to actions to cancel patents, being the act of March 3, 1891 (26 Stat., 1093, c. 559), as amended—in reference to cases arising under railroad and wagon road grants—by the act of March 2, 1896 (29 Stat., 42, c. 39). The first-mentioned statute provides—

> That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

The later act provides—

> That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of [the first quoted statute] * * * is extended accordingly as to the patents herein referred to. *But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.*

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2. This is not an action to cancel patents. It is true that a decree in favor of the Government would necessarily be an adjudication that the patents to the lands involved were erroneously issued, but such an adjudication would be neither legally nor practically equivalent to cancellation of the patents. On the contrary, the only reason for bringing this suit at all is that the patents can not now be vacated or annulled. They were never more than voidable; and the conveyance of the lands to innocent purchasers destroyed the Government's right to avoid them. Indeed, if the result of this suit would necessarily be a vacation or annulment of the patents, it would be absolutely prohibited by the italicized language in the foregoing quotation from the act of 1896 that "no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled." It is not pretended, however, and it can not, of course, be claimed that this action can result in the vacation or annulment of any patent within the meaning of that provision; and that being so, it necessarily follows that the suit is not one to vacate and annul a patent within the meaning of the limitation provision, for there is no escape from the conclusion that the two provisions relate to precisely the same kinds of action.

3. That Congress had in mind the distinction between an action to cancel a patent and a suit like the one at bar is shown in three ways:

(*a*) The act of 1887 concerning adjustment of railroad grants (by direction of which this suit is brought) *in terms dealt with the two sorts of actions.*

It explicitly provided that an action to cancel the patent should be brought if the land had not been conveyed to *bona fide* purchasers and that the present sort of action should be brought if the lands had been so conveyed. That statute was in force when the limitation act of 1891 was passed. Moreover, the act of 1896, extending the limitation period in respect to patents issued under railroad and wagon road grants, itself dealt with both kinds of actions. The very section which extends the limitation period goes on to provide—

> That no suit shall be brought or maintained, nor shall recovery be had for lands *or the value thereof,* that was certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

Here is conclusive proof that Congress, at the very moment that it framed the limitation provision, had in mind the two different sorts of actions. In the same section, separated only by a few words, it on the one hand prescribes a limitation period applicable only to suits to "vacate and annul patents" and, on the other hand, it forbids any suit either to recover the land *or* its value in certain specified cases. Can it be doubted, on such evidence, that the restriction of the limitation provision to actions to cancel patents was deliberate and purposeful?

Nor is that all, for sections 2 and 3 of the same act prescribe methods of procedure by which innocent

purchasers of the patented lands may have their innocence established and their titles confirmed by patents, if they act before a suit to cancel their patents has been brought, and provides for the adjudication of their rights and confirmation of their titles by decree of court if they do not act before suits to cancel patents are brought; and finally provides that whether or not any suits to cancel patents are brought, such purchasers may proceed under section 4 of the act of 1887 to establish their *bona fides* and obtain confirmatory patents, thus establishing a general scheme for settling titles which contemplates throughout the recovery of the government price of the land from the original patentee whenever the lands have passed into the hands of the innocent purchasers; for specific provision for such recovery is made in both section 4 of the act of 1887 and section 3 of the act of 1896. It is inconceivable that Congress would have omitted to provide in terms for the case of actions for the value or price of the lands had it intended that they should be within the limitation provision.

(*b*) The provisions of the act of 1896 show in another way that actions for the price of the land were not within the purview of the limitation clause. Section 2 provides—

> That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if

> it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that a suit be brought in such case against the patentee

for the minimum sale price of the land. This language clearly requires that upon such claim being made the Secretary shall investigate it in such manner and to such extent as may be necessary to determine its correctness. Undoubtedly such an investigation may consume much time; and the act certainly contemplates, if it does not require, that no action to cancel the patent shall be brought until such investigation has been completed. But it may be initiated at any time before a suit to cancel a patent might be brought. Suppose, therefore, that though all possible diligence was used to push the investigation to a conclusion the limitation period ran before it was finally ascertained that the claimant was in fact a *bona fide* purchaser, would that fact prevent the institution of the suit against the patentee for the sale price? Or suppose the investigation were not completed until less than ninety days prior to the running of the statute of limitations. The act of 1887 requires that demand be made on the original patentee and that ninety days thereafter be allowed for payment before a suit to recover the sale price of the land shall be instituted. Was it the intention of Congress to bar the action in such a case?

(*c*) The policy which moved Congress to limit the time for the commencement of actions to cancel patents has no application to actions of the present

sort. It is for the good of all that patents should become incontrovertible after a reasonable time in order that lands held under such patents may be readily marketable. But the public benefit ends there. No good purpose can be subserved by allowing one who has obtained land through mistake or by fraud to retain the proceeds of the sale. To do so would be to put a premium on fraud.

4. The only possible theory upon which it can be claimed that the running of the statute against an action to cancel patents bars an action against the patentee who has sold the land, to recover the proceeds of the sale, is that the running of the statute invests the patentee with good title, just as would be true in the case of an express ratification of the patent. But here the statute of limitations never had such effect; *for in no instance had it run when the lands were conveyed to bona fide purchasers.* At the time of such conveyances appellee had no valid title to the lands, and consequently no right to convey them; *and this action is based upon such wrongful conveyance.* Prior to that event the Government's only right was to set aside the patents and recover the lands; because there was no contract on appellee's part, either express or implied, to pay for the lands, and because no fraud or tort was committed in obtaining them. The case was one of simple mistake, for which the only remedy was the recovery of the property itself. But when the lands were conveyed to innocent purchasers for value the Government forthwith lost its

right to recover the lands themselves (*United States* v. *W. & St. P. R. R. Co.*, 165 U. S., 463, 478–479), and in lieu thereof a right of action was created, based upon the wrongful conveyance of the land, to recover the proceeds of the sale, or rather (because the act of 1887 so limited the amount of the Government's recovery) the government sale price of the land. (*Southern Pacific Co.* v. *United States*, 200 U. S., 341, 352–353; Pomeroy's Eq. Jur., 3d Ed., sec. 1058; Perry on Trusts, 5th Ed., sec. 844; *Lathrop* v. *Bampton*, 31 Cal., 17, 23.)

There can be no doubt that the conveyance to innocent purchasers destroyed the Government's right to recover the lands themselves. Such was the rule independently of any statute on the subject, and the acts of 1887 and 1896 expressly so provide. The purpose and result of those acts was merely to enlarge the scope of the term *bona fide* purchasers so as to include those who, though in fact innocent, might technically be charged with notice. (*United States* v. *W. & St. P. R. R. Co., supra.*) And it is expressly stipulated that the purchasers of the lands involved in this case were all innocent. It is equally clear that the conveyance to innocent purchasers gave rise to the right of the present money action. Appellee held the lands in trust for the United States, the trust being created by operation of law. When it conveyed these lands it violated its trust obligation, and thereupon the Government became entitled to have a trust declared in respect of the proceeds of the sale so

long as they were capable of identification or to sue as an ordinary creditor for such proceeds, whether or not they could be identified. The cited authorities are conclusive as to this. The result is that the cause of action which the Government is now seeking to enforce did not exist until the right to have the patents canceled had been lost; that the statute of limitations had nothing to do with the destruction of the right to cancel the patents (indeed in many instances the right to cancel the patents had been lost before the statute of limitations was originally enacted in 1891) and that consequently there is no possible way in which the statute of limitations can be extended so as to reach the present case.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed and the cause remanded with instructions to grant the relief prayed.

BARTON CORNEAU,
Special Assistant to the Attorney-General.

APRIL, 1910.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 11.

UNITED STATES OF AMERICA,
Appellant,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

In Equity.

BRIEF AND ARGUMENT FOR APPELLEE.

CHARLES E. VROMAN,
Solicitor for Appellee.

GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

No. 173

UNITED STATES OF AMERICA, *Appellant,* *vs.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Appellee.*	In Equity.

STATEMENT.

I. The Act of Congress, approved May 12, 1864, entitled (13 Statutes at Large, 72):

"An Act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said state," granted to the state, "for the use and benefit of the McGregor Western Railroad Company," (and another road) every alternate section of land, designated by odd numbers, for ten sections in width on each side of the road. The Act further provided as follows:

> "But in case it shall appear that the United States have when the lines or routes of said roads are definitely located,

1. Sold any section or any part thereof granted as aforesaid.

2. Or that the right of pre-emption or homestead settlement has attached thereto.

3. Or that the same has been *reserved* by the United States for any purpose whatever."

Then selections were authorized, from indemnity limits, to make up any such deficiency.

"Provided further, that any and all lands *heretofore reserved to the United States by any Act of Congress,* or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, *be and the same are hereby reserved and excepted from the operation of this Act,"* etc.

The Act further provides (Sec. 3):

"That the lands hereby granted shall be subject to the disposal of the legislature of Iowa *for the purposes aforesaid* (railroad purposes) *and no other."*

The essential facts involved are so fully and clearly stated in the opinion of the Circuit Court (Abst., 40-44, Reed, District Judge), that we quote the same as our statement of facts:

"From the pleadings and stipulations of the parties, it appears:

II. 'That the McGregor Western Railroad Company duly accepted the terms of said grant, and on August 30th, 1864, filed in the office of the Secretary of the Interior a map of definite location of the line of its railroad along the prescribed route to a point of intersection in O'Brien County, with said railroad running from Sioux City to the state line of Minnesota, and completed a part of said road, but it and its assigns failed to comply with all of the terms of said grant; that the legislature of Iowa thereupon resumed

the grant, and by Chap. 21, Acts of 17th General Assembly of that state, approved February 27th, 1878, conferred the same upon the Chicago, Milwaukee & St. Paul Railway Company, the defendant herein; that defendant accepted the grant and constructed the road to the point of intersection in O'Brien County with said road running from Sioux City, to the state line of Minnesota, within the time fixed (therefor); that in 1880 the United States, by its proper officers, in recognition of the right of the defendant to the lands embraced in said grant patented the same, including the lands described in the (bill), except two hundred acres thereof, to the State of Iowa for the benefit of the defendant, and that the State of Iowa in the years 1880 and 1881 in like recognition of defendant's right to said land duly patented the same, except said two hundred acres to the defendant as inuring to it under said Act of May 12, 1864.'

III. 'That about November 21st, 1850, the Commissioner of the General Land Office duly instructed the United States Surveyor General for the State of Iowa to make out lists of all the lands granted to said state by the Act of Congress of September 28th, 1850, 9 Stat., 519, C. 84, the Swamp Land grant, and in his letter of instruction said: "The only reliable data in your possession from which these lists can be made, are the field notes of the surveyors on file in your office, and if the authorities of the state are willing to adopt these as the basis of these lists you will so regard them. If not, and these authorities furnish you satisfactory evidence that any lands are of the character embraced in the grant you will report them." On June 23rd, 1860, the Commissioners of the General Land Office sent to said Surveyor General for Iowa, a letter as follows:

"Sir:

Referring to your letter of the 15th inst., asking to be advised as to your duty in reporting

swamp selections in Iowa, and in view of the Act of the 12th of March last, a copy of which was furnished you in my letter of the 21st ult., I will here set forth the principles which you are to apply to any selections now on your files and to all others, also, which may hereafter be reported to you by the agents of the state.

1st. As the grant contemplates the inundation of extensive regions of country by such natural arteries as the Mississippi River, land evidently intended to be granted as swamps are those only which by reason of their swampy character and liability to overflow, are worthless in their natural condition, and whereon crops cannot be raised without reclamation by levees and drains. An overflow or inundation from casual cause merely temporary in its effect does not bring the land within the grant, and cannot be said in any proper sense to render them unfit for cultivation. The law contemplates such long continued overflow or freshets only, as would totally destroy crops and prevent the raising of them without artificial means by levees, etc., such as are found on the Mississippi River.

2nd. Bodies of land covered by shallow lakes or ponds which may become dry by evaporation or other natural causes do not come within the meaning of the swamp grant.

3rd. Testimony now, after the lapse of nine years, to be available, must be explicit, resting upon the personal and exact knowledge of the localities claimed, and must relate to each quarter quarter section, or other equivalent legal subdivision. This testimony must be made by parties having no interest, present or prospective, direct or indirect, and must state the name of the river or water-course whereby the lands are submerged and rendered useless for arable purposes in their natural condition.

4th. I enclose herewith a blank form of proof which you will require from the state authorities, and if lists of lands of this class are furnished

you, accompanied with such evidence, you will report them to this office, in the manner set forth in form 'B' herewith, after making careful examination of said proof, and rendering your own decision thereon, as to whether the several tracts are swamp or not, within the meaning of the grant.

5th. You will as soon as your report is arranged and prepared for transmission to this office, send simultaneously a copy thereof to the local offices of the proper land districts, with instructions to them to enter the tracts in the usual form in their books, and to withhold them from sale or other disposition, unless otherwise especially directed by this office."

——

The form of proof enclosed in the letter appears in the record.

The Surveyor General made no further report to the Commissioner of the General Land Office as to swamp land selections in either of said counties, and gave no directions to any of the local land offices to withhold any of said lands from sale or other disposition as required by said letter of the Commissioner.

IV. 'That prior to and on August 30th, 1864, when the map of definite location of said road was filed in the office of the Secretary of the Interior, none of the lands described in the bill of complaint was covered by any homestead entry, pre-emption declaratory statements, warrant locations or other existing claims of record in the office of the Commissioner of the General Land Office, save and except:

(a) That on August 25th, 1859, there was received and filed in that office, from the United States Surveyor General for Iowa, a certified transcript of a list of lands in Kossuth County on file in his office, including the lands described in the bill of complaint as being in that county, purporting to have been selected as swamp lands by Wm. H. Ingham and Geo. A. Lowe, acting

under appointment of the county court of said county for that purpose. To the original list is attached the affidavit of said Ingham and Lowe sworn to November 11th, 1858, before the county judge stating that they were surveyors appointed to select swamp lands in Kossuth County, and that the lands mentioned in said list were swamp lands;

(b) That on April 3rd, 1860, there was received and filed in that office, from the United States Surveyor General for Iowa, a like list of lands in Palo Alto County, on file in his office, including those described in the bill of complaint, except forty acres thereof, as being in that county, purporting to have been selected swamp lands by Andrew Hood.

The Surveyor General certifies that each of the foregoing lists transmitted by him is a correct transcript of the original list of swamp selections made by the county surveyor, or the state locating agent, and filing in his office.

(c) That the records of said General Land Office further show, that on March 23rd, 1872, there was on file in said office a list of lands in Dickinson County purporting to have been selected as swamp lands by Benjamin F. Parmenter, appointed by the County Court of that county in 1857, to make such selections; which list is sworn to by Parmenter before the County Judge of Dickinson County, July 23rd, 1860, and is endorsed, "Poster in (track) book May 28th, 1872," but no prior record of any kind appears in regard thereto, nor does it appear who transmitted the list to the General Land Office.

That neither of said lists was ever adopted, ratified or confirmed in any manner by the Interior or Land Department of the United States; but said counties continued to claim said lands as swamp and as having been selected as such by or for them under authority of an act of the General Assembly of Iowa approved January 13th, 1853; and said McGregor Western Railroad Company and its successors in interest successively made claim to said lands as inuring to said com-

panies respectively under said act of Congress of May 12th, 1864.

That on May 31st, and October 21st, 1876, the Commissioner of the General Land Office upon public hearings of the matter of such claims, after due notice to all parties interested held and adjudged in writing that the lands described in said act of Congress of September 28th, 1850, and that the State of Iowa and said several counties were never entitled to said lands or any part thereof under said act; that said hearings were pursuant to the act of Congress of March 5th, 1872, 17 Stat., 37, C. 39, and said findings and decisions of said Commissioners were never appealed from, reversed or modified in any manner.'

V. 'That the lands described in the bill of complaint are of the alternate sections and parts thereof designated by odd numbers within ten sections in width on each side of the line of the definite location of said McGregor Western Railroad and were, except two hundred acres thereof, prior to March 2nd, 1896, sold and duly conveyed by the defendant company to numerous persons who bought the same in good faith and for value; and on October 21st, 1898, the Secretary of the Interior held in writing that the titles of all the purchasers of said lands were confirmed in them respectively, under the terms of the act of Congress approved March 2nd, 1896, 29 Stat., 42, C. 39; that due demands were made upon defendant, by direction of the Secretary of the Interior that it reconvey to the United States all of the lands described in the bill of complaint and that it pay to the United States the government price of $2.50 per acre for said lands and that defendant has failed to comply with either of said demands.'

VI. *'That the defendant railway company did not receive from the United States, either directly or through the State of Iowa, the full quota of lands to which it was lawfully entitled under said grant of May 12th, 1864, and that such deficiency is considerably more than the total acreage of all the lands in controversy in this suit.'"*

BRIEF AND ARGUMENT.

It is not claimed that the lands in question fell within the *First* and *Second* reservations of the land grant approved May 12, 1864. Did they fall within the *third* reservation of that Act, as lands "*reserved by the United States for any purpose whatever,*" or, as expressed in the proviso, "*lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever.*"

It is conceded that there was no such reservation, unless under the Act of Congress, approved September 23, 1850, and known as the Swamp Land Act.

(Appellant's Brief, pp. 1, 2, 3.)

The Swamp Land Act is general and grants to the several states "*the whole of those swamp and overflowed lands made unfit thereby for cultivation.*"

The *Secretary of the Interior after approval* was required, as soon as practicable, "*to make out an accurrate list and plats of said lands described as aforesaid, and transmit the same to the Governor.*"

The act expressly provided that,

> "*in making out such lists and plats of lands, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said lists and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.*"

When such list and plats are so made and trans-

mitted by the *Secretary of the Interior to the Governor*, then, at the latter's request, the Secretary is to cause a patent to issue to the state therefor; *and on that patent "the fee simple to said lands shall vest in the said state,"* etc.

It is clear that the Swamp Land Act operates only upon lands which are *actually* of the designated character at the time; namely, *"swamp and overflowed lands made unfit thereby for cultivation,"* and so determined to be by the *Secretary*. In each legal subdivision, if the greater part of the land is "wet and unfit for cultivation," then it is swamp and overflowed land within the definition of the act; *otherwise not.*

If the lands in question *were not in fact* swamp and overflowed within the meaning of the act, they were not reserved under the Act of September 23, 1850, and were not excepted from the operation of the Act of May 12, 1864. The plain wording and necessary construction of the Swamp Land Act include only such lands as are of *swampy* character and exclude *all other lands.*

It is the settled doctrine of the Supreme Court that while the Swamp Land Act of 1850 was a grant *in praesenti*, yet it only passed an *"inchoate title"* to the state. The lands must first be identified as *actually swamp and overflowed*, and thereby made unfit for cultivation; "which being done, *and not before*, the title became perfect as of the date of the granting act."

Rogers Loc. Works v. *Am. Emigrant Co.*, 164 U. S., 570-571, and cases there cited.

Michigan Land & L. Co. v. *Rust,* 168 U. S., 589.

Brown v. *Hitchcock,* 172 U. S., 476.

"But that fact (*i. e.,* swamp or non-swamp), was to be determined, in the first instance, by the *Secretary of the Interior.* It belonge to *him,* primarily to identify all lands that were to go to the state under the act of 1850. When *he made such identification, then,* and *not before,* the state was entitled to a patent, and 'on such patent' the fee simple title vested in the state. The state's title was, in the outset, an *inchoate* one, and did not become perfect, as of the date of the act, until a patent was issued."

Rogers Loc. Works v. *Am. Emigrant Co.,* 164 U. S., 574.

Mich. Land & Lum. Co. v. *Rust,* 168 U. S., p. 592.

Hoyt v. *Weyerhaueser,* 161 Fed., 324.

Sjoli v. *Dreschel,* 199 U. S., 564.

It is in only such lands as are "swamp" in fact that an "inchoate" right can exist, and neither the state or other authority can create such inchoate right in lands not "swamp."

The *second* section of the Act of 1850 expressly conferred upon the *Secretary of the Interior* the power and *duty* to identify, list and plat the particular lands which came within the operation of the act. This necessarily *involved the power and duty of determining and deciding what lands were swamp* and what were not swamp. The Supreme Court say:

"We are of the opinion that his section devolved upon the Secretary, as the head of the department which administered the affairs of the

public lands, the duty, and conferred on him the power, *of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling.*"

French v. *Fyan*, 93 U. S., 171.

Rogers, &c., Works v. *Am. En. Co.*, 164 U. S., 571.

Barden v. *Nor. Pac. Ry. Co.*, 154 U. S., 320-1

Until the decision of the Secretary is made and the patent issued to the state, the grant is in process of administration, the legal title remains in the United States, and the land remains subject to the jurisdiction of the Land Department.

Mich. Land & Lum. Co. v. *Rust*, 168 U. S., pp. 592-3.

The Swamp Land Act did not attempt to regulate the manner in which the Secretary of the Interior should discharge this duty, or prescribe the nature or amount of evidence he might require as to the *character* of the lands. The whole matter was left to his discretion.

In the case at bar no United States Government office or official ever made out any lists or plats, or otherwise designated the lands in controversy as being swamp or overflowed, within the meaning of the Act of 1850. No act of the Interior or Land Departments has ever directly or indirectly recognized them as swamp lands.

On November 21, 1850, the Commissioner of the General Land Office directed the Surveyor General for Iowa to make out a list of swamp lands in that

state, and as a guide in that work, advised him as follows:

> "The only reliable data in your possession from which these lists can be made out, are the field notes of the surveyors on file in your office, and if the authorities of the state are willing to adopt these as the basis of these lists, you will so regard them. If not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will *report* them."
>
> (Stipulation of facts, Par. 12.)

It would seem that these instructions are general.

Mich., &c., Co. v. *Rust,* 168 U. S., 601-2.

The record is silent upon the point, but evidently the state authorities were not willing to accept the field notes of the government surveys. It does not appear what such notes disclosed, as to the character of the lands in controversy, but as they are in the possession of the government, and are not produced, or put in evidence, the *presumption* must obtain, here, that they do not show these lands to have been swamp or overflowed, within the meaning of the act.

Kirby v. *Tallmadge,* 160 U. S., p. 383.
Ry. Co. v. *Elliott,* 102 Fed., p. 102.
Ry. Co. v. *Ellis,* 54 Fed., 481.
Waterhouse v. *Mining Co.,* 97 Fed., p. 477.

In any event, the Supreme Court holds that the field notes of public surveys have no binding force in determining the actual character of lands (whether mineral or swamp) because the *law does*

not leave the determination of such questions to the Surveyor General or his subordinates.

Barden v. *Nor. Pac. Ry. Co.*, 154 U. S., 320.

And such is the ruling of the Interior Department.

Cole v. *Markley*, 2 Decisions Int. Dept. on Public Lands, 847-49.

We come now to the action of the state authorities, in listing and claiming these lands as swamp.

By the act of January 13, and supplemental Act of January 24, 1853, the legislature of Iowa granted all swamp and overflowed lands to the several counties in which they were located; provided for the selection of such lands by agents appointed by the County Court; required such agents to report their selections to the Secretary of State, and made it his duty to forward the same to the Surveyor General of the United States.

(Acts 1853, pp. 29 and 116.)

The records of the General Land Department at Washington show:

(A) That on August 22, 1859, the Surveyor General for Iowa transmitted to that office a list of lands in Kossuth County, Iowa, "purporting to have been *selected* as swamp lands by William H. Ingham and George A. Lowe, acting under appointment of the County Court for that purpose." To the original list was attached their affidavit, dated November 11, 1858, and sworn to before the County Judge, stating that they were surveyors appointed by said County Court to select swamp lands in that county, "and that the lands mentioned in this said list were swamp

lands." *The Surveyor General simply certified that the list so transmitted by him was a correct "transcript" from the original list filed in his office.* Such transcript was received and filed in the General Land Office on August 25, 1859.

(B) That on March 27, 1860, said Surveyor General for Iowa also transmitted a list of lands in Palo Alto County, Iowa, "purporting to have been *selected* as swamp lands by *Andrew Hood.*" To the original list was attached his affidavit, dated December 15, 1859, and sworn to before the County Judge, stating that he was "disinterested" and that the lands in his list "were swamp land," but not showing any authority in him to make such selection or list. *The Surveyor General simply certified that the list so transmitted by him was a correct "transcript" from the original list filed in his office.* Such transcript was received and filed in the General Land Office on April 3, 1860.

(C) These records further show that on March 23, 1872, there was on file in the General Land Office at Washington, a list of lands in Dickinson County, Iowa, "purporting to have been selected as swamp lands by Benjamin F. Paramenter." To the original list was attached his affidavit, dated July 23, 1860, and sworn to before the County Judge, stating that he was a practical surveyor, had examined the lines bounding each of the tracts, and that all the 40 acre or other tracts named in his list were swamp or overflowed lands embraced in the Act of Congress. Said County Judge certified that Parmenter had been commissioned and authorized by him to "select and make return of the swamp or

overflowed lands in said county," embraced in said Act of Congress. Said list was endorsed at Washington "*posted on tract book May* 28, 1872," and no prior record entry of any kind in regard to such Dickinson County selections or list appears in that office. The Commissioner of the General Land Office sent a copy of such list to the District Land Office at Sioux City on March 23, 1872. It does not appear that this list was ever filed with the Surveyor General for Iowa or that he transmitted any such list to the General Land Office.

(See Stipulation of Facts, Par. 7 and Subdivisions.)

It is important to note that these alleged selections or lists did not comply with the Act of Congress, or the laws of Iowa, or even with the regulations of the General Land Office.

But Congress has imposed upon the Secretary of the Interior *alone,* the power and duty to decide what lands passed under the grant, *i. e.,* what lands were swamp, and what were not swamp. The state had absolutely no duty or authority in the matter. The Department instructed the Surveyor General (1) that the "*only reliable data*" for swamp lists were the field notes of government surveys, and that if the state was willing to accept those, he should report them accordingly; (2) if not, and the state authorities furnished "satisfactory evidence" that any lands were of the character embraced by the grant, he was to "report" such lists and proofs. The county authorities appear to have rejected the first and accepted the second plan. *They made "se-*

lections" of lands claimed to be swamp, and filed lists thereof with the Surveyor General at Dubuque. He forwarded them to Washington, without approval or recommendation. These alleged "selections" were claims of agents. They did not comply with the Iowa law of 1853, which required county agents to report their selections to the Secretary of State, and made it *his duty* to forward them to the Government at Washington. This was provided in order to allow the state, as the beneficiary of the grant, to reject or approve the work of its subordinate agencies, and to make claim, and present proofs through the proper channels and as the act of the state itself.

These acts, reports, etc., of so called "selections" by the state and county agents can be regarded as nothing more than evidence of a fact which the Secretary of the Interior must, by law, *himself determine.* The reports and statements of these agents are merely advisory, and the only purpose they can serve is to assist the proper authority (the Secretary) in arriving at a correct decision of the *fact* as to whether or not the lands concerned are *swamp* or *no swamp.*

In *Barden* v. *Northern Pacific Ry. Co.,* 154 U. S., 288, the effect of the report and plats of the surveyor, in a like case, were under consideration. The court says:

> "Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained

in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, *nor does their report have any binding force.* It is simply an addition made to the general information obtained from different sources on the subject. In *Cole* v. *Markley* (2 Decision Dept. of the Interior relating to Public Lands, 847-849), Mr. Teller, when Secretary of the Interior, in a communication to the Commissioner of the General Land Office, speaks at large of the notations of surveyors, and says: 'Public and official information was the object of these notations, with a view to preventing entry until the facts are finally determined. They should be, and they are, only *prima facie* evidence, and subject to be rebutted by satisfactory proof of the real character of the land.' The determination of the character of the land granted by Congress, in any case, whether agricultural or mineral, or *swamp* or timber land, is placed in the officers of the Land Department whose action is subject to the revision of the Commissioner of the General Land Office, and on appeal from him by the Secretary of the Interior."

But in any event, these so called selections wholly failed to comply with the requirements of the Land Department, and for that reason were *rejected at Washington before the passage of our land grant of May 12th,* 1864.

The record shows that on June 23, 1860, the Commissioner of the General Land Office explicitly instructed the Surveyor General for Iowa in writing as to his "duty" in reporting swamp selections and as to the principles he should apply to any such selections *then on his files,* or thereafter reported to him by agents of the state. He first announced the

departmental construction of the words "swamp and overflowed lands made unfit thereby for cultivation," as used in the act of 1850, and then says:

> "3d. Testimony now, after the lapse of nine years, *to be available, must be explicit,* resting upon the personal and exact knowledge of the localities claimed, and must relate to each quarter, quarter section, or other equivalent legal subdivision. This testimony must be made by parties having no interest, present or prospective, direct or indirect, and must state the name of the river or water course whereby the lands are submerged and rendered useless for arable purpose in their natural condition.
>
> 4th. I enclose herewith a blank form of proof which you will require from the state authorities, and if lists of land of this class are furnished you, *accompanied with such evidence,* you will report them to this office in the manner set forth in Form 'B' herewith *after making a careful examination of said proof, and rendering your own decision thereon, as to whether the several tracts are swamp or not, within the meaning of the grant.*"

Paragraph 14 of the Supplemental Agreement of Facts sets out in full this letter of instruction and also the form and quantum of proof required by the Department in all cases.

At that time the Kossuth and Palo Alto County lists were on file with the Surveyor General at Dubuque and copies had been transmitted to Washington. The Dickinson County list was never filed with the Surveyor General, and was first filed at Washington on March 23, 1872—twelve years afterwards.

(Stipulation, Par. 7.)

A comparison between the proofs required by the Land Department, and the so-called proofs fur-

nished by County Agents, will disclose that these selections and lists in controversy absolutely and wholly failed to meet the requirements of the Department.

(See Agreed Facts, Pars. 7 and 14.)

The Commissioner's ruling of June 23, 1860, expressly applied to all swamp selections and lists *then on file*, but it is agreed that

> *"said Surveyor General afterwards made no report relating to swamp land selections in Kossuth or Palo Alto County, Iowa, as required by the 4th and 5th paragraphs of said letter of June 23, 1860, and that he gave no instructions to any local offices or land districts as contemplated in the 5th section of said letter."*
>
> (Stipulation, Pars. 14 and .....)

This serves to explain why the Land Department never accepted or recognized these pretended selections and lists from Kossuth, Palo Alto and Dickinson Counties. They were not even *prima facie* claims or proofs, and no others were ever made or filed.

Moreover, on June 30, 1862, the Commissioner of the General Land Office in a communication to the Governor of Iowa, plainly set forth the nature and amount of proof required in swamp selections and finally *rejected* all state indemnity claims then on file, because of insufficiency of proof as to the swampy character of the lands upon which they were based. It is true that this ruling was made on *indemnity claims* only, but it necessarily involved the broad question as to swamp land claims and proofs of every character. It advised the State of Iowa

what selections and lists would be accepted, and what would be rejected as insufficient. In effect it passed upon and rejected all so-called selections and lists then on file and now in controversy. (See Agreed Facts, Par. 17.)

In view of these rulings of June 23, 1860, and June 30, 1862, and the subsequent non-acceptance and non-recognition of lists filed in conflict therewith, we are justified in claiming, and asking the court to hold, that the swamp land sections and lists from Kossuth and Palo Alto Counties, in question, were in fact disallowed and rejected by the Land Department, *prior to our railroad grant of May* 12, 1864. And this is further shown by the subsequent action of Secretary Lamar in withdrawing these lands from sale or entry, after our map of definite location was filed on August 30, 1864.

But, it is expressly agreed that on May 31st and October 21st, 1876, the Commissioner of the General Land Office, after public hearings upon due notice to all parties, *held and adjudged in writing* that the Dickinson, Kossuth and Palo Alto County lands in controversy in this suit,

> *"were not, in fact, swamp or overflowed lands, and were not of a character embraced in said Act of Congress of September* 28, 1850, *and known as the Swamp Land Act; and that the State of Iowa, and said several Counties, were never entitled to said lands or any part thereof, under said act."*

These hearings were had pursuant to the express requirements of the Act of Congress of March 5, 1872, and the findings and decisions of the Commissioner

"were never appealed from, reversed or modified in any manner, as shown by the records of said General Land Office."

(See Stipulation of Facts, Par. 8.)

This constitutes a *final adjudication* that the lands in controversy were never swamp lands, and that they did not pass to the State of Iowa under the Swamp Act of 1850, but did pass to the defendant company under the railroad grant of 1864. Such decision is binding and conclusive upon the courts.

McCormich v. *Hayes*, 159 U. S., 332.
Barden v. *Nor. Pac. Ry. Co.*, 154 U. S., 327-8.
Heath v. *Wallace*, 138 U. S., 585.
Chandler v. *Mining Co.*, 149 U. S., 79.
Steele v. *Smelting Co.*, 106 U. S., 450.
French v. *Fyan*, 93 U. S., 171.
U. S. v. *W. & St. P. R. R. Co.*, 15 C. C. A. Repts., 96.

It is agreed that in compliance with this decision, the United States, on April 12 and October 12, 1880, patented and conveyed to the State of Iowa, for the benefit of this defendant, all the lands in controversy; and that on April 26, 1880, and February 15, 1881, the Governor of said state duly patented and conveyed the same lands to the defendant company, as enuring to it under the Act of 1864. The form of these patents is set out in the stipulation of facts, Par. 5.

These acts *forever estopped* the State of Iowa and said counties from claiming or asserting that the lands were swamp, and properly selected as such. They amounted to a complete and final abandonment

of its claims, and an express recognition of the rights of this company and the correctness of the decision of the Land Department.

Rogers Loc. Works v. *Am. Emigrant Co.*, 164 U. S., pp. 575-7.

Mich Land & Lumb. Co. v. *Rust*, 168 U. S., pp. 598-9.

Brown v. *Hitchcock*, 173 U. S., 473.

Young v. *Charnquist*, 114 Iowa, 116.

In view of the foregoing facts and decisions it cannot successfully be contended that these lands were "*reserved by the United States for any purpose whatever,*" at the time our map of definite location was filed on August 30, 1864. As they were not swamp or overflowed lands, they did not and could not pass to, or be claimed by the State of Iowa under the Swamp Land Act of 1850, nor could the state acquire an inchoate interest in them. That law, *ex proprio vigore*, reserved all public lands, *if then swamp;* otherwise not. This would seem to be a mere truism.

If these lands were not swamp in fact, they were not "reserved" from the operation of the railroad grant of 1864.

This record establishes without conflict that they were *not* swamp; that the tribunal appointed for that purpose held them to be *non-swamp* in character; and the decisions show that such adjudication is final and conclusive upon this and all other courts.

It is utterly immaterial whether the State of Iowa, or its agents, did or did not "select" these lands. A mere selection or *claim* by the beneficiary could not

make them swamp, if not so in fact, or have any weight whatever in determining that question. As said by the Supreme Court:

> "The Act of Congress does not provide that *selections* of the lands by the plaintiff, as a part of its grant, *shall in any respect change its purport and effect and eliminate any of its reservations.*"
>
> *Barden* v. *Nor. Pac. Ry. Co.*, 154 U. S., p. 321.

Not even the field notes of Government surveys, or any report of the Surveyor General, could establish the actual character of the lands, or affect any rights of this Company.

Id., p. 320.

> "The term 'selection' is not an apt word to describe the identification of certain lands according to evidence presented of their character."
>
> *Mich. Land & Lumb. Co.* v. *Rust*, 168 U. S., 601.

These state "selections," so-called could not determine the actual character of the lands or whether they were reserved from the railroad grant, or even be *prima facie* proof upon that question. *They were mere claims or contentions of the state*, and, possibly furnished some proof for the Interior Department to consider. Until approved and adopted by the Interior Department, such "selections" had absolutely no force or validity.

As the Interior Department made no lists or plats of its own, it must necessarily approve and *formally adopt* the selections made by the counties, before

they could have any validity or force, as determining the actual character of the lands, or reserving them, under the Swamp Act. It is conceded that the Department never in any manner approved such selections of the lands in controversy. It did not withdraw the lands from sale, entry or settlement, and in no way recognized the validity of the selections or the alleged character of the lands; but, on the contrary, the department, after a hearing, *rejected* such selections as not swamp in fact. This final decision related back to and determined the *actual character* of these lands in 1850.

The Secretary of the Interior being officially charged with the duty of deciding and designating what lands were actually "swamp" had no power to delegate such duty to the beneficiary or its agents, or confer any power in that behalf, and no one else had any power to assume it. The "selections" made by state representatives, considered either as agents or informants of the Secretary, were not his acts or selections *until* formally adopted and ratified by him.

Humbried v. *Avery*, 195 U. S., 507.

The true and final *test* must be the actual character of the lands in controversy, not what they were claimed or asserted or selected to be. Their character having been adjudicated by the tribunal appointed for that purpose—by the complainant itself in fact. It ought to be *estopped*, as a suitor, from now claiming the contrary.

In this connection we call particular attention to the case of *Rogers Locomotive Works* v. *American*

Emigrant Company, 164 U. S., 559. That was a suit to quiet title to certain lands in Calhoun County, Iowa. Plaintiff claimed under the Swamp Act of 1850 and defendant under its railroad land grant of 1856. The latter act contained the *same reservation* as in the case at bar. The wording was identical. The lands in controversy were selected by duly authorized and appointed agents of Calhoun County, as swamp lands, and were reported September 30, 1858. On December 25, 1898, the General Land Office certified said lands to the state for the benefit of the railroad under its grant, but expressly "*subject* to all its conditions, and to any valid interfering rights which may exist to any of the tracts." This certificate was approved by the Secretary of the Interior, "subject to the conditions and rights above mentioned."

On March 27, 1860, the Surveyor General for Iowa certified to the Land Department that said lands had been "selected" by state locating agents as swamp lands; that such lists had been "carefully compared with field notes, plats and other evidence on file in his office"; and that by their affidavits it appeared that such lands were "swampy or subject to such overflow as to render the same unfit for cultivation, and therefore of the character contemplated by the Act of 28th of September, 1850." These lists were filed in the Land Office at Washington March 27, 1860, and were sent to the local Land Office at DesMoines on February 18, 1874. It did not appear that the Secretary of the Interior took any action upon these lists, or that the State or County ever sought it.

In holding that the railroad claim was superior and must prevail, the court, Harlan, J., says:

> "In 1858 the Secretary of the Interior, decided that the lands in controversy inured to the state under the railroad act of 1856, and, if that decision was correct, *then they were not reserved from the operation of that act by the Swamp Land Act of* 1850." (p. 575.)
>
> "It would seem that upon every principle of justice the action of the Secretary of the Interior in certifying these lands to the State under the act of 1856 should not be disturbed." (p. 575.)
>
> "If the state considered the lands to be covered by the Swamp Land Act, its duty was to surrender the certificate issued to it under the railroad act. It could not take them under one act, and while holding them under that act pass to one of its counties the right to assert an interest in them under another and different act." (p. 575.)

It was held that both state and county were concluded by the act of the Secretary of the Interior in certifying the lands accepting and retaining them, under that act.

The state being estopped in that case, why should not the Government, the complainant, be estopped or concluded here? The facts in the case at bar are less favorable to complainant than in the case last referred to. The United States appears here as a suitor and not in its sovereign capacity, and is therefore, subject to the same legal and equitable principles as other suitors.

The appellant pretends that the action of the state authorities in making lists of alleged swamp lands, as they did, "segregated" such lands from the pub-

lic domain, and that as to such lands, the railroad grant of 1864 did not attach.

It clearly appears from the preceding argument and from the authorities cited, that some official act of the Secretary or his authorized agents is necessary to set aside or "segregate" lands from the public domain. The act of the state authorities in that behalf, not in any way endorsed or approved by federal authority, cannot affect such segregation.

In the case at bar, the list of lands made by the local agents of the state were never in any manner approved or recognized by the Secretary or anyone acting under his authority. The Surveyor General of Iowa in 1859 and 1860 (p. 27 Abst.), sent the lists of lands made by the local state agents in Palo Alto and Kossuth Counties with a certificate that the lists so sent were copies of lists on file with him. But neither in the certificate nor in any communication to the Secretary, did the Surveyor General approve of the list as swamp lands, or recommend that they were lands of that character. These lists of lands, if not substantially rejected at the time, were at least ignored by the Secretary, and on June 23rd, 1860 (Abst., 32), the Secretary wrote the Surveyor General of Iowa, laying down definite rules to be followed in making up such lists, and stating the quantum of proof required by the Secretary before such lists of alleged swamp lands would be considered by the Federal authorities.

Following this letter nothing was done by the state authorities in the way of making new lists, or furnishing proof as to the old lists which had been

sent in, nor was any further report made by the Surveyor General of the State. This was the status of the matter at the time of the passage of the land grant of 1864. (Abst., 28, 29.)

A list of alleged swamp lands in Dickinson County, made by the local authorities of the state, was found on file in the General Land Office at Washington March 23rd, 1872. This list does not seem to have passed through the office of the Surveyor General of the State, nor has it been recognized in any manner by Federal authority.

In support of its contention, the appellant cites and relies upon

Whiting v. *Taylor,* 158 U. S., 85.
Newell v. *Sanger,* 92 U. S., 761.
Kansas Pacific Ry. Co. v. *Dunmeyer,* 113 U. S., 629.
Wright v. *Rosebery,* 121 U. S., 488.
Hastings, &c., R. R. Co. v. *Whitney,* 132 U. S., 357.
Southern Pacific Ry. Co. v. *U. S.,* 200 U. S., 354.
Michigan Land & Lumber Co. v. *Rust,* 168 U. S., 589, 591.

In *Newell* v. *Sanger,* the lands in question were claimed under a Mexican grant protected by treaty. Pursuant to such treaty, a commission had been appointed to determine the validity of the claim in question and other like claims. The court held on the facts, that the lands in question had been segregated.

In *Kansas Pacific Ry. Co.* v. *Dunmeyer,* it appeared

that a homestead entry had been made and had been recognized by the Land Office before the map of definite location by a railway company had been filed. The court held that the entry on the books of the Land Office segregated the land so that it was not a part of the public domain, and that the land grant therefore did not attach.

In *Wright* v. *Rosebery*, the State of California listed certain lands as swamp, which list was approved by the Commissioner and in this manner recognized. The court, however, held that the issue of a patent to a third party was not necessarily void, but that its validity depended upon the question of fact as to whether the lands were *swamp* or *no swamp*.

In *Hastings, &c.* v. *Whitney*, the homestead entry had been made upon the lands in question, allowed by the Registrar, entered in the tract book, and the fees paid by the entryman.

In *Whiting* v. *Taylor* it appeared that

> "At the time of the filing by the plaintiff railway company of its map of definite location, there stood upon the records of the local land office a homestead entry."

This entry was valid on its face and was allowed by the Department and had attached to the land before the railroad act was passed; held, that the land was reserved from the operation of such grant, and that the subsequent cancellation of the homestead entry did not cause it to inure to the benefit of the railroad. The entry of the land as a homestead segregated it from the public domain so that the land grant did not take effect.

The case of the *Southern Pacific Railroad Company* v. *United States* was similar in its facts to the case of *Newell* v. *Sanger, supra.*

It is seen at a glance that these cases all differ from the case at bar. Here there has been no recognition of the lists filed, by the local authorities of the state. In the cases referred to there was a recognition, either in fact or by treaty or by legislation.

Judge Adams, writing the opinion of the Circuit Court of Appeals in this case sums up the situation so clearly that we take the liberty of quoting briefly from his opinion (Abst., 69):

> "In view of the foregoing authorities, we think the mere assertion of a claim to land unrecognized by the Land Department of the Government in any manner, cannot operate to reserve or segregate the public domain so as to prevent disposition of it by the United States. The consequences of any other doctrine condemns it. If the state can claim any land, and by the mere fact of claiming it, prevent any subsequent disposition of it, it could claim all lands and thereby prevent disposition of any and all the public domain. The improbability of such conduct on the part of the state does not withdraw its possibility from legitimate consideration. We are not prepared to give our sanction to a rule that would permit this blockade upon settlement and enterprise."

The Land Grant of May 12th, 1864, was a grant *in presenti.*

St. Paul & Pac. R. Co. v. *Northern Pac. Ry. Co.*, 139 U. S., 5.

U. S. v. *So. Pac. Ry. Co.*, 146 U S., 593.

> "The purpose of filing a map of definite location is to enable the land department to designate the lands passing under the grant; and when a

map of such a line is filed, full information is given, and, so far as that line may legally extend, *the law perfects the title.*"

U. S. v. *So. Pac. Ry. Co.*, 146 U. S., 597.

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, *the law withdraws from sale or pre-emption, the odd sections.*"

U. S. v. *So. Pac. Ry. Co.*, 146 U. S., 600.

Such map of definite location may be filed in the office of the Secretary of the Interior *or* of the Commissioner of the General Land Office; either is sufficient.

Butts v. *Nor. Pac. Ry Co.*, 119 U. S., 72.

U. S. v. *So. Pac. Ry. Co.*, 146 U. S., 600.

"Although the Act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the Department in such cases to formally withdraw them."

Butts v. *Nor. Pac. Ry. Co.*, 119 U. S., 72.

St. P. & Pac. Ry. Co. v. *Nor. Pac. Ry. Co.*, 139 U. S., 18.

U. S. v. *So. Pac. Ry. Co.*, 146 U. S., 600.

There is a want of equity in plaintiff's claim. One of the stipulated facts reads as follows (Abst., 31):

"11. It is further stipulated and agreed that the defendant railway company did not receive from the United States, either directly or through the State of Iowa, the full quota of land to which it was lawfully entitled under the terms of the

> Act of Congress, approved May 12, 1864, and that such deficiency was very considerably more than the total acreage of all the lands in controversy in this suit."

The lands in question were not swamp in fact, and were so finally declared by the Secretary. They were within the place limits of the grant and of right belonged to the Railway Company under such grant. When the Government patented these lands to the state for this Company, it conveyed only a part of what it owed in lands. It has lost nothing. No fraud has been perpetrated upon the Government by the railroad companies entitled to the land, nor are they or any of them charged with any fraud or unfair practices. Judge Adams at page 70 of the abstract, discusses this feature of the case with much force.

Respectfully submitted,

CHARLES E. VROMAN,
Solicitor for Appellee.

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